No. 95-591-CFX
Status: GRANTED

Title: United States, Petitioner
v.
International Business Machine Corporation

Docketed:
October 12, 1995

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Atwood,James R.

NOTE: Due 100895 (SUN) -100995 (HOL) 110195 Per Mr. Singer respond. shld be as above.

Entry	Date	Note	Proceedings and Orders
1	Oct 10 1995	G	Petition for writ of certiorari filed. (Response due November 11, 1995)
2	Nov 7 1995		Brief of respondent International Business Machines Corporation in opposition filed.
3	Nov 21 1995		DISTRIBUTED. December 8, 1995 (Page 2)
4	Nov 21 1995	X	Reply brief of petitioner filed.
5	Dec 8 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 19, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. Rule 29.2 does not apply. **********
6	Dec 15 1995	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
7	Jan 8 1996		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
8	Jan 19 1996		Brief of petitioner United States filed.
9	Jan 24 1996		SET FOR ARGUMENT NONDAY, MARCH 18, 1996. (2ND CASE).
10	Feb 6 1996		CIRCULATED.
11	Feb 7 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Federal Circuit.
12	Feb 8 1996		Record filed.
		*	Certified record proceedings United States Court of Federal Claims.
13	Feb 16 1996	X	Brief of respondent International Business Machines Corporation filed.
14	Mar 7 1996	X	Reply brief of petitioner filed.
15	Mar 18 1996		ARGUED.

95-591

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). The question presented in this case is:

Whether, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad, the tax imposed by Section 4371 of the Internal Revenue Code violates the Export Clause of the Constitution of the United States (U.S. Const. Art. I, § 9, Cl. 5).

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In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 59 F.3d 1234. The opinion of the Court of Federal Claims (App., *infra*, 12a-30a) is reported at 31 Fed. Cl. 500.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a) was entered on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States provides, in relevant part:

a. Art. I, § 8, Cl. 3:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

b. Art. I, § 9, Cl. 5:

> No Tax or Duty shall be laid on Articles exported from any State.

c. Art. I, § 10, Cl. 2:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws * * *.

2. The Internal Revenue Code provides, in relevant part:

a. 26 U.S.C. 4371:

> There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer, a tax at the following rates:
>
> (1) 4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indem-

> nity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);
>
> * * * * *

b. 26 U.S.C. 4372:

> (a) For purposes of section 4371, the term "foreign insurer or reinsurer" means an insurer or reinsurer who is a nonresident alien individual, or a foreign partnership, or a foreign corporation. * * *
>
> (b) For purposes of section 4371(1), the term "policy of casualty insurance" means any policy (other than life) or other instrument by whatever name called whereby a contract of insurance is made, continued, or renewed.
>
> * * * * *
>
> (d) For purposes of section 4371(1), the term "insured" means—
>
> (1) a domestic corporation or partnership, or an individual resident of the United States, against, or with respect to, hazards, risks, losses, or liabilities wholly or partly within the United States, * * *
>
> * * * * *

c. 26 U.S.C. 4373 (1982):[1]

> The tax imposed by section 4371 shall not apply to—
>
> > (1) Any policy, indemnity bond, or annuity contract signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business; * * *
>
> * * * * *

d. 26 U.S.C. 4374:

> The tax imposed by this chapter shall be paid, on the basis of a return, by any person who makes, signs, issues, or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued, or sold. * * *

STATEMENT

1. Respondent International Business Machines Corporation brought this suit in the Court of Federal Claims to obtain a refund of $1.5 million in taxes assessed under Section 4371 of the Internal Revenue

[1] This provision was amended in 1988 to conform its language to terminology elsewhere employed by Congress to describe activities that are "effectively connected" to activities within the United States and are therefore subject to the federal income tax. See 26 U.S.C. 864(c), 882(a)(1). The amendment does not alter the application of the statute in the context of this case.

Code. IBM does not dispute that the taxes were correctly assessed under the statute. Instead, IBM contends that the statute is unconstitutional as applied to the facts of this case.

a. Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)).[2] The tax is to be paid by "any person * * * for whose use or benefit" the policy is "made, signed, issued, or sold." 26 U.S.C. 4374.

Section 4371 was enacted in 1942 to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942). The tax therefore does not apply if the insurance policy issued by the foreign insurer is "signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business." 26 U.S.C. 4373(1) (1982). See also note 1, *supra*; 26 C.F.R. 46.4371-2(a).

b. IBM manufactures a variety of business products that it sells throughout the world. During the period involved in this case, IBM shipped products for international sales from its manufacturing facilities in Arizona, California, Colorado, Florida, Minnesota, New York, North Carolina, Virginia and Texas (App., *infra*, 13a-14a). IBM made its inter-

[2] The term "foreign insurer" is defined to mean an insurer "who is a nonresident alien individual, or a foreign partnership, or a foreign corporation" (26 U.S.C. 4372(a)).

national sales through a network of more than one hundred wholly owned subsidiares (*id.* at 14a-15a):

> Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders. * * *
>
> Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were destined for a United States airport (typically, John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the Far East), but some shipments were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for two to five days, but could remain * * * as long as thirty days. The products would be reloaded at the freight forwarders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, they were unloaded, cleared customs, and loaded on trucks for shipment to their final destination.

The terms of sale specified that title to the goods, and risk of loss, passed from IBM to its foreign subsidiaries only when the goods cleared customs in the foreign country. The foreign subsidiaries were nonetheless required to bear the cost of insuring the products against damage or loss during the entire shipment (App., *infra*, 15a).

The insurance obtained for these shipments was "point to point": it covered the risk of damage or loss during transportation of the goods from the IBM facility in the United States to the point of foreign delivery. When IBM made the arrangements, the insurance was placed with a domestic insurer and the cost was billed to the foreign subsidiary. When the foreign subsidiary made the arrangements, the insurance was often placed with a foreign carrier, which the subsidiary paid directly. In both situations, IBM and its foreign subsidiary were listed as joint beneficiaries on the policies of insurance (App., *infra*, 15a-16a).

If damage occurred before the goods cleared customs—while IBM retained title to the goods and risk of loss—IBM received the insurance proceeds directly under these policies. If the loss occurred *after* the goods cleared customs—when title and risk of loss had passed to the importing foreign subsidiary—the insurance proceeds were paid to the subsidiary. In the latter event, the proceeds were used by the subsidiary to pay the full purchase price of the damaged products to IBM or, if IBM had already been paid, to reimburse the subsidiary for its loss (App., *infra*, 16a).

c. IBM filed federal excise tax returns for 1975 through 1984 but did not report any liability under Section 4371 of the Internal Revenue Code. On audit, the Internal Revenue Service determined that the premiums paid to foreign insurers were subject to the tax imposed by Section 4371 and that, pursuant to Section 4374, IBM was liable for the tax as a named beneficiary of the insurance policies.

The foreign subsidiaries reported to IBM that, during 1980, they had paid premiums of $2,065,137 to foreign insurers for "point to point" insurance for shipments of products that IBM manufactured in the United States. The tax applicable to those premiums under Section 4371 of the Code—calculated by multiplying the premiums by four percent—is $82,605. The parties stipulated that the foreign insurance premiums attributable to shipments of IBM products in each of the years 1975-1979 and 1981-1984 were the same as in 1980. The IRS therefore assessed the same amount of tax for each of those years under Section 4371 (App., *infra*, 18a).

2. IBM paid the resulting assessments and filed claims for refund. When those claims were denied, IBM commenced this refund suit in the Court of Federal Claims.

a. IBM contended that the tax imposed by Section 4371 of the Internal Revenue Code—as applied to insurance premiums for losses occurring during the shipment of goods from locations within the United States to purchasers abroad—violates the Export Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. IBM contended that the tax on insurance for export

shipments is a "Tax or Duty * * * laid on Articles exported" and is invalid under the specific holding of this Court in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915). In *Thames & Mersey*, the Court held a federal stamp tax on policies insuring marine risks unconstitutional as applied to shipments for export.

The United States contended that the analysis of *Thames & Mersey* is no longer valid. The government reasoned that subsequent decisions of the Court, such as *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), require the conclusion that the Export Clause does not invalidate a generally applicable, nondiscriminatory tax that does not fall uniquely and discretely on articles of export or export transactions.

b. The Court of Federal Claims held that application of the tax imposed by Section 4371 to insurance premiums for goods in export transit violates the Export Clause because it "amounts to a tax on exports" (App., *infra*, 26a). The court reasoned that this conclusion follows from the precise holding of this Court's 1915 decision in *Thames & Mersey*, which stated (237 U.S. at 26):

> It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation.

The Court of Federal Claims emphasized that, under *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), lower courts "must adhere to the accepted practice of following Supreme Court precedent unless the Supreme Court

clearly states that it is overruling earlier cases and explains why it is doing so" (App., *infra*, 28a). The court found no clear evidence that *Thames & Mersey* has been overruled or that its analysis has been discarded by this Court. The court held that *Thames & Mersey* therefore remains authoritative and that it compels the conclusion that the tax imposed by Section 4371 is unconstitutional as applied in this case (*id.* at 29a).

The court acknowledged that this Court's more recent decisions under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* have upheld application of nondiscriminatory state taxes to goods and services involved in importation and exportation. The court concluded, however, that those decisions could be distinguished on their facts. The court explained that *Washington Stevedoring*—which upheld application of a state gross receipts tax to a stevedoring company that handled export and import shipments—concerned "stevedoring" rather than "insurance" and that "stevedoring is a service whose value is not necessarily tied to the value of the goods it serves" (App., *infra*, 29a). The court further stated that *Michelin Tire*—which upheld application of a state property tax to imported goods located within the borders of the State—is inapposite because "in *Michelin* the [imported goods] had left the import stream and were * * * thus outside the scope of the Import-Export Clause" (*ibid.*).

3. The court of appeals affirmed (App., *infra*, 1a-11a). The court noted (*id.* at 11a) that this Court has admonished the lower courts that (*Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. at 484)

> [i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

The court of appeals stated that it was therefore bound to follow *Thames & Mersey*, and hold the tax imposed by Section 4371 unconstitutional as applied in this case, unless subsequent decisions of this Court "clearly signaled" an intent to overrule that earlier decision (App., *infra*, 8a).

The court of appeals concluded that it was "not so sure" (App., *infra*, 8a) that *Washington Stevedoring* and *Michelin Tire* signaled the requisite clear intent of this Court to abandon the analysis of *Thames & Mersey*. The court of appeals did not dispute that, if an analysis "similar" to that applied under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* were applied under the Export Clause, the holding and reasoning of *Thames & Mersey* would be discredited (App., *infra*, 7a-8a). Instead, the court stated that it was not certain that a similar analysis would be applied because there is a difference in the language of the two Clauses that could require a different result: the Import-Export Clause bars States from laying "Imposts or Duties on Imports or Exports"; the Export Clause bars the United States from laying any "Tax or Duty * * * on Articles exported from any State." The court of appeals stated (*id.* at 9a-10a):

> Although the [Supreme] Court at first expressed the view that the "diversity in language" between the two clauses did not reflect any difference in

"the act which is prohibited," *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827), in both *Michelin* and *Washington Stevedoring* the Court has noted and attached significance to the difference between the narrow term "Imposts and Duties" * * * and the broader term "Tax" * * *. *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759.

Reasoning that a "tax" that might be permitted under the "narrow" language of the Import-Export Clause might nonetheless be invalid under the "broader" language of the Export Clause (App., *infra*, 10a), the court concluded that the recent Import-Export Clause decisions fail to provide the requisite clear guidance that would permit a lower court to "disregard[] a higher court decision that all agree is binding precedent if it is still valid" (*id.* at 10a-11a).[3] The court therefore held "that [its] duty is to follow *Thames & Mersey* and hold Section 4371 invalid as applied" (*id.* at 11a).

REASONS FOR GRANTING THE PETITION

The decision in this case holds a federal statute unconstitutional as applied to a significant, recurring set of commercial transactions. The court of appeals concluded that the federal tax on insurance premiums paid to a foreign insurer for risks that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1))—as applied to casualty insurance for shipments from within the United States to foreign countries—repesents a "Tax or Duty * * * laid on

[3] The court of appeals noted that the United States had conceded that, "if *Thames & Mersey* is still good law, the assessments at issue in this case are invalid" (App., *infra*, 6a).

Articles exported" (U.S. Const. Art. I, § 9, Cl. 5) and therefore violates the Export Clause of the Constitution. The court stated, in reaching that conclusion, that it was compelled to follow this Court's 1915 decision in *Thames & Mersey Marine Ins. Co.* v. *United States*, *supra*, even though the analysis of that decision has been placed in question by more recent decisions of this Court.

Only this Court has "the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. at 484. The Court has directed lower courts to "follow the case which directly controls" even when that case "appears to rest on reasons rejected in some other line of decisions" (*ibid.*). As the result, only this Court can determine whether the considerations that led it to uphold generally applicable, nondiscriminatory state taxes under the Import-Export Clause—in *Michelin Tire* and *Washington Stevedoring*—also require that the generally applicable, nondiscriminatory federal statute involved in this case be upheld under the Export Clause of the Constitution.

The question presented in this case is of substantial recurring importance. The proper scope of the Export Clause has significance not only for the tax imposed under Section 4371 but also for other nondiscriminatory federal taxes of general application. For example, Section 4461 imposes on all shippers a "tax on any port use" of 0.125 percent of the value of all commercial cargo loaded or unloaded in United States ports. See 26 U.S.C. 4461(a), (b) (Supp. V 1993), 4462(a)(1). Approximately 700 cases are currently pending in the United States Court of International Trade challenging the constitutionality

of that statute under the Export Clause. See *United States Shoe Corp.* v. *United States*, No. 94-11-00668 (Ct. Int. Trade).[4] The Federal Circuit has exclusive jurisdiction over any appeal from the decision in those cases. 28 U.S.C. 1295(a)(5).

The Federal Circuit is a court of nationwide jurisdiction. Since all taxpayers are entitled to pay a challenged tax and sue for a refund within the Federal Circuit, it is unlikely that other courts of appeals will have an opportunity to review this issue under Section 4371 or other affected statutes. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions that present issues of substantial importance. See, *e.g.*, *United States* v. *Hill*, 113 S. Ct. 941, 945 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Review by this Court of a decision of the Federal Circuit holding a statute of Congress unconstitutional is fully warranted.

1. The tax imposed by Section 4371 of the Internal Revenue Code is not specifically directed to nor directly "laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5). Instead, it applies to insurance premiums paid to foreign insurers for any casualty risk that is "wholly or partly within the United States" (26

[4] Similar litigation is also pending in the federal district court in Maryland. See *American Ass'n of Exporters and Importers, Inc.* v. *Bentsen*, No. L94-1839 (D. Md.). The United States has moved to dismiss that case on the grounds that exclusive jurisdiction over cases under Section 4461 lies in the Court of International Trade. See 28 U.S.C. 1581(a); 26 U.S.C. 4462(f)(2).

U.S.C. 4372(d)(1)). It thus applies without discrimination to "wholly" domestic transactions as well as to risks that are only "partly" within the United States. As the House Ways and Means Committee observed when the statute was enacted in 1942, Section 4371 is designed to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, *supra*, at 61.

As a generally applicable, nondiscriminatory tax that is not discretely and exclusively imposed on "Articles exported," the tax imposed under Section 4371 is constitutional. It violates neither the text nor the object of the Export Clause and is validated by the recent decisions of this Court. In particular, in *Michelin Tire*, the Court "initiated a different approach to Import-Export Clause cases" that upholds generally applicable taxes that reach "services provided * * * to imports, exports, and other goods" without discrimination. *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. at 752, 761. The analysis of *Michelin Tire* and *Washington Stevedoring* applies equally to challenges to federal taxes under the Export Clause and, under that analysis, the tax imposed by Section 4371 should be sustained.

2. a. *The Export and Import-Export Clauses Are Complementary in Scope.* In this Court's first case under either the Import-Export or the Export Clause, Chief Justice Marshall observed of the two Clauses that "[t]here is some diversity in language, but none is perceived in the act which is prohibited." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827). That observation has been repeated by this

Court on numerous occasions.[5] In the more numerous cases under the Import-Export Clause and the less numerous cases under the Export Clause, the Court has routinely cited cases under the two Clauses without differentiation. Moreover, the analysis applied in opinions under the two Clauses has not varied.[6]

b. *The "Original Package" Doctrine Under the Import-Export Clause.* In *Brown* v. *Maryland*, a Maryland statute required that importers or wholesalers of foreign articles or commodities purchase a license costing $50 to sell such goods. 25 U.S. (12 Wheat.) at 436. Brown was convicted of having imported and sold a package of foreign dry goods without having obtained a license. In holding that the statute violated the Import-Export Clause, the Court explained that a tax on the privilege of sale was, in substance, a duty upon things imported for sale. *Id.* at 439. Rejecting the suggestion that this would mean that imported goods would be perpetually immune from taxation, the Court stated that an import retains its "distinctive character" only while in the "original form or package in which it was imported" (*id.* at 442).

[5] See, *e.g.*, *Turpin* v. *Burgess*, 117 U.S. 504, 506-507 (1886); *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904); *United States* v. *Hvoslef*, 237 U.S. 1, 14 (1915); *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 67 n.5 (1974).

[6] The suggestion of the court of appeals that the language of the Export Clause may be "broader" in its prohibitive scope than the language of the Import-Export Clause (App., *infra*, 10a) does not withstand analysis. The entire text of the two Clauses must be considered. The Import-Export Clause precludes States from imposing "Imposts or Duties on Imports or Exports"; the Export Clause specifies that no federal "Tax or Duty shall be laid on Articles exported." U.S. Const. Art. I, § 10, Cl. 2; Art. I, § 9, Cl. 5. An "impost" on an "export" *is* a "tax" on an "Article exported"; a "tax" on an "Article exported" *is* an "impost." Under the text of the two Clauses, it is the charge collected on the item exported that is at issue. A "tax" that is not "laid on" "Articles exported" does not fall within the scope of the Export Clause. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. at 293-294; pages 23-24, *infra*.

In the *License Cases*, 46 U.S. (5 How.) 504 (1847), Chief Justice Taney acknowledged that a tax directed at imports would be invalid and did not question the validity of the "original package" doctrine. But he concluded that a generally applicable, nondiscriminatory state property tax would not be unconstitutional merely because it also applied to imported goods (*id.* at 576):

> Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State.

In *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872), however, the Court reached a different conclusion, holding that a generally applicable California property tax could *not* be imposed upon a shipment of French champagne held in an importer's warehouse in the "original package" in which shipped. *Id.* at 35. In doing so, the Court neglected to consider the con-

trary conclusion of Chief Justice Taney in the *License Cases*, although his approval of the "original package" doctrine was cited by the Court. *Id.* at 33-34.[7]

c. *The Early Export Clause Cases.* The Export Clause was invoked in *Pace* v. *Burgess*, 92 U.S. 372 (1876), by a tobacco manufacturer who, in 1868, was subject to a federal excise tax on tobacco products. Although tobacco intended for export was exempt from the tax, the exemption was subject to the requirement that packages for export be identified by an affixed engraved stamp costing 25 cents. The manufacturer brought suit to recover the price of the exemption stamps, claiming that they constituted a prohibited tax on exports. The Court denied recovery, explaining that the exemption stamps were designed to prevent fraud and did not represent a tax. *Id.* at 375.

In 1882, however, Congress discontinued the charge for the exemption stamp in a statute that referred to the stamp as an "export tax." Act of Aug. 8, 1882, ch. 468, 22 Stat. 372. On that basis, another tobacco manufacturer sued to recover the amounts he had paid for exemption stamps before the charge was discontinued. The Court adhered to its decision in *Pace* v. *Burgess*, but with a somewhat different rationale. In describing the Export and Import-

[7] The so-called "original package" rule was also followed in *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878), *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218 (1933), and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945). See also *May* v. *New Orleans*, 178 U.S. 496 (1900), and *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959).

Export Clauses, the Court stated (*Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886) (emphasis added)):

> The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. * * * But *a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition.*

Relying upon the above passage, the Court subsequently held that a manufacturer of cheese for export could not—merely from the fact that the cheese was intended for export—escape liability for the federal tax of one cent per pound upon that product. *Cornell* v. *Coyne*, 192 U.S. 418, 428 (1904). The Court explained that the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated" (*id.* at 427).

d. *The Decision in Thames & Mersey.* The direct ancestor of *Thames & Mersey* was *Fairbank* v. *United States*, 181 U.S. 283 (1901). That case involved a provision of the War Revenue Act of 1898 that imposed a variety of stamp taxes on written instruments, including "bills of lading * * * for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place" (ch. 448, § 26, 30 Stat. 459). In *Fairbank*, the Court held that the stamp tax on bills of lading for exported goods violated the Export Clause. Invoking a prior, similar holding under the Import-Export Clause (*Almy* v. *California*, 65 U.S. (24 How.) 169 (1861)), the Court held that the tax upon the bill of

lading was invalid because it was equivalent to a tax upon the exported articles themselves.

Two cases argued on the same day are the cases upon which IBM relies. Like *Fairbank*, they involved taxes imposed by the War Revenue Act of 1898. Unlike *Fairbank*, however, neither tax was imposed expressly or directly on export transactions. *United States* v. *Hvoslef*, 237 U.S. 1 (1915), involved a federal stamp tax upon any "Contract or agreement for the charter of any ship" (§ 26, 30 Stat. 460). *Thames & Mersey*, on which IBM most directly relies, involved a federal stamp tax on policies of marine insurance "whether against peril by sea or on inland waters" (§ 26, 30 Stat. 461). Since these statutes did not differentiate between domestic voyages and shipments to foreign ports, it might have been supposed that they would be sustained as general taxes of neutral application under the reasoning of *Turpin* v. *Burgess* and *Cornell* v. *Coyne*. See page 19, *supra*.

In *Hvoslef*, however, the Court instead invoked *Fairbank* without acknowledging that the stamp tax challenged in *Hvoslef*, unlike the tax challenged in *Fairbank*, was of general, not limited, application. In support of its decision in *Hvoslef*, the Court also invoked *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887). *Robbins* was the first of "a long line of 'drummer' cases" under the Commerce Clause, in which the Court held that a State could not impose a licensing fee on a person who solicited orders for goods to be shipped from another State.[8] The Court stated in *Robbins* (*id.* at 497):

[8] See *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 392 (1952). *Robbins* had a numerous progeny. See, *e.g.*, *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891); *DiSanto* v. *Pennsylvania*, 273 U.S. 34 (1927); *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946). Among the more recent was *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which this Court overruled in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). See page 25, *infra*. These decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause. Although the Commerce Clause is a limitation on the powers of the States, it *confers* powers on the United States. See page 29, *infra*.

> It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

Having applied *Fairbanks* and *Robbins* to immunize export transactions from broadly applicable taxing provisions in *Hvoslef*, the Court entered its decision in *Thames & Mersey* two weeks later on the authority of *Hvoslef*. 237 U.S. at 27.

The decisions in *Hvoslef* and *Thames & Mersey* established a pattern that this Court subsequently followed of immunizing export transactions from generally applicable federal taxes. For example, when Congress imposed a general tax on various sporting goods under the War Revenue Act of 1917, ch. 63, § 600(f), 40 Stat. 316-317, the Court invoked *Hvoslef* and *Thames & Mersey* to hold that the Export Clause prohibited imposition of the tax to a shipment of baseballs and bats to a purchaser in Venezuela. *A.G.*

Spalding & Bros. v. *Edwards*, 262 U.S. 66 (1923). See also *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292 (1917) (same under Import-Export Clause). Similarly, in *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), the Court held that gross receipts or sales taxes could not be imposed upon payments for loading or unloading ship cargoes transported in interstate or foreign commerce.

e. *The Modern Doctrine.* Toward the end of this period of decisions, there were indications of reconsideration. For example, in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254-255 (1938), the Court heavily qualified, if it did not contradict, the broad rationale of *Robbins* on which *Hvoslef* was based. And, in *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951), the Court indicated a revised view of the proper treatment of taxes upon transactions related or collateral to importation and exportation when it wrote (*id.* at 514-515):

> The difference [between this case and cases such as *Spalding*] is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. * * * [W]hen the tax is on activities connected with the export or import the range of immunity cannot be so wide.

Full reconsideration finally came in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). See also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984). Those decisions expressly overruled many

of the decisions previously discussed and, without cataloging them in detail, rejected other decisions that had disposed of the same issues in the same fashion.

(i) *Michelin Tire* involved the constitutionality of a state property tax as applied to imported tires held in the importer's warehouse in Georgia. Invoking the "original package" doctrine applied in *Low* v. *Austin*, the importer maintained that its imported tires were exempt from state tax. The Court rejected that claim, holding that (423 U.S. at 279)

> Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires is not within the constitutional prohibition against laying "any Imposts or Duties on Imports * * *", and * * * insofar as *Low* v. *Austin*, 13 Wall. 29 (1872) is to the contrary, that decision is overruled.

In reaching that decision, the Court reviewed the text and object of the Import-Export Clause, as well as its historical origin. 423 U.S. at 283-284. The Court noted that the considerations that gave rise to the Clause were that: (i) the federal government must speak with one voice in regulating commercial relations with foreign governments, and state tariffs on exports and imports could conflict with that requirement; (ii) import revenues were to be the major source of revenue to the federal government and should not be diverted to the States; and (iii) harmony among the States would be disrupted if the seaboard States could tax goods passing through their harbors to or from their inland neighbors. *Id.* at 285. The Court observed that nondiscriminatory property taxes interfere with none of the constitu-

tional concerns of the Import-Export Clause. *Id.* at 286-290.

Addressing the specific text of the Import-Export Clause in *Michelin Tire*, the Court "decline[d] to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" (423 U.S. at 293-294). The Court explained that the "original package" language of *Brown* v. *Maryland* had been misunderstood (*id.* at 298):

> [I]t is clear that the Court's view in *Brown* [v. *Maryland*] was that merely because certain actions taken by the importer on his imported goods would so mingle them with the common property within the State as to "lose their distinctive character as imports" and render them subject to the taxing power of the State, did not mean that in the absence of such action, no exaction could be imposed on the goods. Rather, the Court clearly implied that the prohibition would not apply to a state tax that treated imported goods in their original packages no differently from the "common mass of property in the country"; that is, treated it in a manner that did not depend on the foreign origins of the goods.

The Court further noted that the opinion in *Low* v. *Austin* had misread Chief Justice Taney's opinion in the *License Cases* which "makes crystal clear that the prohibition applied only to state exactions upon imports *as imports* and did not apply to nondiscriminatory ad valorem property taxes." 423 U.S. at 300. See pages 16-17, *supra*.

(ii) In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Court held that the Commerce

Clause does not bar application of a generally applicable state tax to the gross revenues of a company engaged exclusively in the transportation of motor vehicles in interstate commerce. The Court reconsidered and overruled its decision in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which, following *Robbins*, had held that Connecticut could not impose a tax for the privilege of engaging in interstate commerce. See page 20 & note 8, *supra*. The Court noted in *Complete Auto* that it was unquestioned that the activity engaged in by the taxpayer was sufficiently connected to the State to justify a tax, that the tax was fairly related to the benefit provided to the taxpayer, that the tax did not discriminate against interstate commerce, and that the tax was not unfairly apportioned. 430 U.S. at 287. Under those circumstances, the Court concluded that "the *Spector* rule does not address the problems with which the Commerce Clause is concerned" and overruled that decision. *Id.* at 288. The Court's holding in *Complete Auto* necessarily, albeit implicitly, overruled *Robbins* and the "long line of 'drummer' cases" that that decision had spawned. See note 8, *supra*.

(iii) In *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), the Court considered the State of Washington's renewed attempt to apply its gross receipts tax to the proceeds generated from loading and unloading ocean-going vessels. In the earlier decisions in *Puget Sound* and *Carter & Weekes*, the Court had invoked the Commerce Clause to hold unconstitutional the application of the State's tax to the proceeds of stevedoring cargoes in interstate and foreign commerce. See page 22, *supra*. In

Washington Stevedoring, however, the Court had little difficulty, after *Complete Auto*, in overruling those decisions insofar as the Commerce Clause was involved. 435 U.S. at 743-751.

The Import-Export Clause required separate consideration. *Michelin Tire* had inquired whether a generally applicable tax that does not favor or disfavor imports or exports conflicts with any of the policies leading to the adoption of the Import-Export Clause and had upheld the application of the property tax to imported goods, whether or not in the original package, when it found no friction or inconsistency. A similar inquiry led the Court to conclude in *Washington Stevedoring* that the generally applicable Washington tax on gross receipts from stevedoring offended none of the policies of the Import-Export Clause. 435 U.S. at 754-755. The Court specifically rejected the suggestion that the fact that *Michelin Tire* dealt only with goods no longer in transit required that the cases be differentiated. *Id.* at 755-757. The Court noted that *Canton Railroad* demonstrated that the analysis that prevailed in *Michelin Tire* was not to be discarded simply because the goods were in transit. *Ibid.* Moreover, the fact that *Michelin Tire* involved only imports while the Washington tax related to proceeds from stevedoring exports as well did not call for a different conclusion. *Id.* at 757-758. The Court concluded that the considerations that led to the decision in *Michelin Tire* were equally applicable to the Washington tax. *Ibid.*[9]

[9] Justice Powell concurred separately in *Washington Stevedoring*. He concluded that the controlling factor in that case, as in *Michelin Tire*, is that local taxpayers should not be required to subsidize the services used and enjoyed by importers and exporters; instead, the consumers of such goods should pay for the services rendered by government just as they paid transportation costs. 435 U.S. at 761-764.

(iv) In *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), the Court made clear that more than just a few named decisions had been overruled by *Michelin Tire* and *Washington Stevedoring*. Instead, in overruling an earlier decision that had invalidated the application of a "nondiscriminatory ad valorem personal property tax to imported fibers still in their original packages" (*id.* at 354), the Court emphasized that the reasoning that underlay those earlier decisions had been "*repudiated*" (*id.* at 362). The fact that the Court in *Michelin Tire* did not explicitly name all of the cases whose reasoning had been rejected does not indicate that those older decisions retain "current validity." *Id.* at 361.

f. *Application of the Modern Doctrine to the Export Clause.* There is no reason why the more recent decisions of this Court should not be authoritative with respect to the Export Clause, and every reason why they should be. As we have noted, beginning with *Brown* v. *Maryland* and periodically since then, the Court has stated that the two Clauses have the same scope. Moreover, cases under the two Clauses have been cited by the Court without differentiation. Most recently, in *Washington Stevedoring*, the Court cited *Spalding* (an Export Clause case) along with cases involving state taxes and the Import-Export Clause to illustrate reasoning that was no longer approved. 435 U.S. at 752.

As this Court explained in *Washington Stevedoring*, the Court in *Michelin Tire* "surveyed the

history and purposes of the Import-Export Clause to determine, for the first time, which taxes fell within the absolute ban on 'Imposts and Duties'" (435 U.S. at 751). The Court concluded from this examination that a generally applicable tax that merely falls, without discrimination, on imports and exports as well as other goods, does not violate the Import-Export Clause. 423 U.S. at 302.

An examination of the history and objectives of the Export Clause similarly demonstrates that the generally applicable, nondiscriminatory tax imposed by Section 4371 of the Internal Revenue Code does not violate that Clause. As the court of appeals noted (App., *infra*, 4a), the Export Clause reflected the fear of the agricultural and exporting southern States that the more populous and numerous northern States would impose discriminatory taxes on the export of their products. The debate is well described in Charles Warren's classic *The Making of the Constitution* 570-574 (reprint 1993) (1928).[10] See also

[10] The central portion of Warren's description is as follows (at 571-572) (footnote omitted):

> The question of a prohibition of taxes and duties on exports now brought these sectional differences into an outbreak in the Convention.
>
> It is to be noted, as a preliminary to consideration of this clash, that the Committee's proposal to forbid export duties was a very radical departure from the theory and practice theretofore prevailing in governmental taxation. As has been well said: "To attempt to organize a Government without the power to tax exports was an innovation. From time immemorial, every nation had taxed whatever productions of its soil its inhabitants might presume to export. In the old economy, its maxim was to tax exports but to admit imports free." The prohibition of export duty

App., *infra*, 4a; Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 305-308, 359-363, 441-442 (1966) (proceedings of August 16, 21, 28, 1787).

It is beyond question that the tax imposed by Section 4371 is generally applicable and discriminates against no region or product. It applies equally to fire, storm, flood, and earthquake insurance, and to insurance against damage or loss for shipments from, for example, San Francisco to Alaska, Hawaii, or Guam, or from New York to Miami or Galveston, as it does to insurance covering IBM's shipments to its foreign subsidiaries or their customers. Moreover, the United States—like the States—assists and protects IBM's shipments over highways within the United States (financed in substantial part by the federal government) as well as in the movement of such goods by sea or air beyond our borders.

It must also be recognized that the Commerce Clause gives Congress comprehensive authority over exports and imports. It was established early that Congress had the power to embargo or otherwise control the export of such goods or materials as it chose. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 191-192

> now inserted in the new Constitution was not based, however, on any change in economic theory but on purely political and sectional conditions. The South, being agricultural and having three great crops which grew nowhere else,—tobacco, rice, and indigo,—feared that the possession of this power by Congress would enable the North to discriminate against it, by a tax which would operate only on the peculiarly Southern articles of export. This fear had been expressed early in the Convention.

(1824); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 566-567 (1850); *United States* v. *The William*, 28 Fed. Cas. 614, 620-623 (D. Mass. 1808) (No. 16,700). It is, of course, well established that the taxing power may be employed in the regulation of foreign commerce. *Board of Trustees* v. *United States*, 289 U.S. 48, 57, 58 (1933). The Export Clause removes only a small and narrowly defined area from this far-ranging authority.

Considering the origins of the Export Clause, and this Court's more recent decisions, the prohibitions of that Clause should be confined to taxes directly and exclusively assessed upon, and discriminating against, "Articles exported." The federal statute that the court of appeals held unconstitutional in this case does not violate that standard.

3. The statute that the court of appeals invalidated cannot effectively be enforced without this Court's further review. Under the decision in this case, any taxpayer who obtains foreign insurance for export shipments may pay an assessment under Section 4371 and obtain a refund by bringing suit within the Federal Circuit. See page 14, *supra*. Congress enacted the tax imposed by Section 4371 to raise "an appreciable amount of revenue" and to "eliminate an unwarranted competitive advantage" for foreign insurers who do not pay federal income taxes. H.R. Rep. No. 2333, *supra*, at 61. Absent review by this Court, these statutory objectives will plainly be defeated. And, as the court of appeals recognized (App., *infra*, 11a), it is uniquely the responsibility of this Court to complete the task of eliminating inconsistency in its own jurisprudence in this area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5164

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Appealed from: U.S. Court of Federal Claims

DECIDED: July 10, 1995

Before: ARCHER, *Chief Judge*, PLAGER and BRYSON, *Circuit Judges.*

BRYSON, *Circuit Judge.*

This case raises a question concerning the constitutionality of a federal statute. The government, as appellant, acknowledges that a 1915 Supreme Court decision is directly on point and that, if the decision is still good law, the statute at issue must be held unconstitutional as applied. The government argues, however, that the 1915 decision has been undermined by subsequent Supreme Court authority, and it asks us to regard that case as no longer binding. We do not regard it as clear that the

Supreme Court's more recent decisions have repudiated the 1915 decision. We therefore affirm the decision of the Court of Federal Claims invalidating the taxes at issue in this case.

I

During the pertinent tax years, 1975 through 1984, International Business Machines Corporation (IBM) sold information processing systems and related products to domestic and foreign customers. With respect to many of its foreign sales, IBM manufactured products in the United States, sold them to its foreign subsidiaries, and shipped them either directly to the foreign customers or to consolidation centers in the customers' countries. The products were shipped by common carrier from IBM's domestic manufacturing plants to domestic ports or airports, where they were loaded onto ships or airplanes. Upon arrival in the foreign country, the products were cleared through customs and shipped to the foreign customers or consolidation centers. Title to the products passed from IBM to its foreign subsidiaries when the goods cleared customs in the foreign countries. In some cases, IBM's foreign subsidiaries purchased insurance from foreign insurers for the products during their shipment; in those cases, both IBM and the foreign subsidiaries were listed as insured beneficiaries.

The Internal Revenue Service audited IBM's federal excise tax returns for 1975 through 1984 and determined that, as a beneficiary, IBM was subject to a four percent excise tax on the premiums paid to foreign insurers. The excise tax was assessed under the authority of 26 U.S.C. § 4371, which imposes a four percent tax on each policy of casualty insurance issued by a foreign insurer to a domestic entity for risks or liabilities wholly or partly within the United States. Section 4371 applies only to insurance obtained from foreign insurers who are not subject to

federal income tax; it was designed to offset the advantage that such insurers would otherwise have over domestic insurance companies that are subject to domestic income taxes. *See* H.R. Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942).

IBM paid the assessed excise taxes and filed suit in the Court of Federal Claims, seeking a full refund of the taxes paid. In a thorough opinion on which we rely, the Court of Federal Claims held that the excise tax on premiums charged by foreign insurers, as applied to casualty insurance on goods in the export stream, was in effect a tax upon the exported products themselves and thus ran afoul of the Export Clause of the Constitution, Article I, Section 9, Clause 5. *International Business Machines Corp.* v. *United States*, 31 Fed. Cl. 500 (1994). In so holding, the court relied on the Supreme Court's decision in *Thames & Mersey Marine Insurance Co.* v. *United States*, 237 U.S. 19 (1915), which struck down a similar tax on marine insurance policies.

The Court of Federal Claims rejected the government's argument that the analysis in the *Thames & Mersey* case has been repudiated in subsequent Supreme Court decisions, and that the excise tax imposed on foreign insurance policies should be upheld as a permissible tax of general application that does not discriminate against exports. Instead, the court concluded that casualty insurance is an integral part of commercial exportation, that the value of exported goods bears a close relationship to the value of insurance policies on those goods, and that the tax imposed in this case therefore amounted to a tax on exports, prohibited by the Export Clause.

II

This case presents the question whether the Supreme Court analysis of the Export Clause in the *Thames & Mersey* case retains its vitality in the wake of subsequent Supreme Court decisions

involving the Import-Export Clause, Article I, Section 10, Clause 2, in which the Court has modified its approach to issues arising under that Clause.

A

The Export Clause provides, in one sentence: "No Tax or Duty shall be laid on Articles exported from any State." Along with the Import-Export Clause, which prohibits any State, without the consent of Congress, from laying "any Imposts or Duties on Imports or Exports," the Export Clause was "one of the compromises which entered into and made possible the adoption of the Constitution." *Fairbank* v. *United States*, 181 U.S. 283 (1901).

At the Constitutional Convention, strong sentiments were voiced on the subject of export taxes. Representatives of the Southern States expressed concern that a Congress controlled by the more numerous and populous Northern States would impose burdensome levies on Southern exports. Charles Pinckney of South Carolina insisted that security against taxes on exports be included in the Constitution, on a par with security against the emancipation of the slaves. 2 *The Records of the Federal Convention of 1787* 95 (Max Farrand ed. 1927). According to Madison's notes, George Mason of Virginia likewise "urged the necessity of connecting with the power of levying taxes duties &c, . . . that no tax should be laid on exports. . . . He hoped the [Northern] States did not mean to deny the Southern this security." *Id.* at 305. Concern over the risk of abuse of the power to tax exports was expressed even by a Northern delegate, Elbridge Gerry of Massachusetts, who stated his view that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it." *Id.* at 307.

Acknowledging the importance of the Export Clause and its flat prohibitory language, the Supreme Court has consistently given the Clause a broad construction. In one of the first major decisions applying the Export Clause, the Court struck down a stamp tax imposed on bills of lading relating to goods designated for foreign export. Such a tax, the Court explained, "is in substance and effect equivalent to a tax on the articles included in that bill of lading, and, therefore, a tax or duty on exports, and in conflict with the constitutional prohibition." *Fairbanks* v. *United States*, 181 U.S. at 312.

In applying that test, the Court distinguished between taxes imposed on property prior to its entering the export stream and taxes imposed, directly or indirectly, on property during the export process. For example, in *Cornell* v. *Coyne*, 192 U.S. 418 (1904), the Court upheld a tax on filled cheese that was imposed prior to its exportation, holding that a nondiscriminatory tax on manufactured cheese was not unconstitutional simply because the manufacturer intended from the outset to export the cheese. By contrast, in *United States* v. *Hvoslef*, 237 U.S. 1 (1915), the Court struck down a tax imposed on charter parties for the carriage of cargo to foregin ports. As applied to the charter parties for export at issue in the case before it, the Court held that the tax was "nothing else than a tax on exportation" and thus prohibited by the Export Clause. *Id.* at 18. It did not matter, the Court held, that the statute in question was not limited to charter parties for exports, but applied to charter parties generally; even if the statute in question created a nondiscriminatory tax or general application, it was unconstitutional to the extent that it was applied to charter parties for export, because in so doing, it had the prohibited effect of imposing a tax on exports. *Id.*

Two weeks after *Hvoslef*, the Supreme Court in the *Thames & Mersey* case struck down a stamp tax

on policies of marine insurance to the extent that it applied to policies insuring exports. The Court put the question as whether "the tax upon such policies [is] so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition." 237 U.S. at 25. Finding that marine insurance "is by virtue of the demands of commerce an integral part of the exportation," *id.* at 26, the Court concluded that the tax at issue, as a practical matter, fell upon the exporting process and therefore was invlaid under the Export Clause.

B

The government concedes that if *Thames & Mersey* is still good law, the assessments at issue in this case are invalid. In the government's view, however, subsequent decisions construing the Import-Export Clause have rendered *Thames & Mersey* analytically unsound. The government contends that the Export Clause should be interpreted not to outlaw taxes of general application, as long as they do not discriminate against exported goods or services relating to exports. The government therefore invites this court to disregard the Supreme Court's contrary analysis of the Export Clause in *Thames & Mersey*.

In pressing its case against *Thames & Mersey*, the government relies particularly on two decisions construing the Import-Export Clause, *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978). Prior to the *Michelin* decision, the Supreme Court viewed the Import-Export Clause as erecting a general prohibition against state taxation of imports and exports. The focus of inquiry was on whether the impact of the tax fell on goods that were in foreign commerce; if it did, the tax was forbidden (except in the limited

circumstances permitted by the Clause itself). *See Almy* v. *California*, 65 U.S. (24 How.) 169 (1861); *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872).

In the *Michelin* case, the Court jettisoned that mode of analysis and adopted a new approach based on the text and purposes of the Import-Export Clause. Overruling its prior decision in *Low* v. *Austin*, the Court held that a nondiscriminatory ad valorem property tax does not run afould of the Import-Export Clause simply because it is applied to goods that have recently been imported. The Court noted that the Import-Export Clause bans only "Imports or Duties"; it "is not written in terms of a broad prohibition of every 'tax.'" *Michelin*, 423 U.S. at 290. Moreover, the Court explained that the Framers adopted the Import-Export Clause to ensure that the federal government would speak with one voice in regulating commerce with foreign nations, to preserve import revenues for the federal government, and to protect states without port facilities from exploitation by those directly engaged in foreign commerce. None of those concerns, the Court stated, is triggered by a nondiscriminatory ad valorem tax "which is also imposed on goods that are no longer in import transit." 423 U.S. at 286.

The Supreme Court used similar reasoning to reach a similar result two years later in the *Washington Stevedoring* case. In that case, which involved an Import-Export Clause challenge to a state tax on stevedoring services, the Court rejected an argument that the tax was impermissible when applied to stevedoring services relating to foreign imports and exports. A nondiscriminatory tax on stevedoring services was not an "import or duty" on imports or exports, the Court concluded, but simply a local tax on services that happened to facilitate the importation and exportation of goods.

Relying on *Michelin* and *Washington Stevedoring*, the government argues that Section 4371

should be upheld as a nondiscriminatory tax that does not specifically target exports and therefore is not an invalid "tax or duty" laid "on articles exported from any State." Although *Michelin* and *Washington Stevedoring* arose under the Import-Export Clause, rather than the Export Clause, the government argues that the Supreme Court is likely to follow a similar analysis under the Export Clause when the occasion arises.

The government finds additional support for its position in cases decided under the Commerce Clause. As under the Import-Export Clause, early Commerce Clause cases struck down even nondiscriminatory taxes on the privilege of doing business in a state when applied to an activity that was part of interstate commerce. *See, e.g., Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951); *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1987). That line of cases, however, was overturned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), in which the Court held that the Commerce Clause is not violated by the application of a fairly apportioned and nondiscriminatory tax on the privilege of doing business in a state, even if the tax is applied to an interstate activity.

The government points out that in *Hvoslef* (and by extension in *Thames & Mersey*, which relied on *Hvoslef*) the Court invoked the line of Commerce Clause authority that was disapproved in *Complete Auto*. The government also points out that the Court's analysis of the Export Clause in *Thames & Mersey* paralleled the Court's then-governing approach to the Import-Export Clause, which has also been disapproved. Accordingly, the government submits, the analytical foundations of *Thames & Mersey* have been removed, and its demise is a foregone conclusion.

We are not so sure. While the Supreme Court may at some point reconsider *Thames & Mersey*, it has

not clearly signaled that it is ready to do so. Support for the continuing vitality of *Thames & Mersey* can be found both in the Court's Import-Export Clause decisions and in the distinctions in language and policy betewen the Import-Export Clause and the Export Clause.

In *Canton Railroad Co.* v. *Rogan*, 340 U.S. 511 (1951), a predecessor of the *Washington Stevedoring* case, the Supreme Court upheld state taxes on transportation services as applied to goods being imported or exported. The Court was careful to distinguish *Thames & Mersey*, noting that the tax on marine insurance policies addressed in *Thames & Mersey* was "the equivalent of a direct tax on the articles." 340 U.S. at 513-14. And in *Washington Stevedoring*, the Court recognized that the tax on insurance policies in *Thames & Mersey* was on an "activity so connected with the goods that the levy amounted to a tax on the goods themselves." 435 U.S. at 756 n.21. Although the *Washington Stevedoring* Court acknowledged that "the basis for distinguishing *Thames & Mersey* is less clear" than for other similar cases (because marine insurance policies arguably have a value apart from the value of the insured goods), the Court noneless noted that "the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* Thus, while the Court's treatment of *Thames & Mersey* may reflect less than a ringing endorsement of that decision, the Court's characterization of *Thames & Mersey* as distinguishable from, rather than in tension with, the *Canton Railroad* and *Washington Stevedoring* cases significantly undermines the government's contention that *Thames & Mersey* must be regarded as a dead letter.

The Supreme Court has also pointed to the difference in language between the Import-Export Clause and the Export Clause. Although the Court at

first expressed the view that the "diversity in language" between the two clauses did not reflect any difference in "the act which is prohibited," *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827), in both *Michelin* and *Washington Stevedoring* the Court has noted and attached significance to the difference between the narrow term "Imposts and Duties" (the language of the Import-Export Clause) and the broader term "Tax" (the language of the Export Clause). *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759.

The Court has suggested that a difference in policy underlies the difference in language. While the Import-Export Clause was intended to prohibit States from imposing a "transit fee" on goods moving in foreign commerce, *Washington Stevedoring*, 435 U.S. at 764 (Powell, J., concurring in part and concurring in the result), the Export Clause served the broader purpose of "forbid[ding] federal taxation of exports." *Washington Stevedoring*, 435 U.S. at 758. The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction.

III

Urging us to anticipate the overruling of *Thames & Mersey*, able counsel for appellant has called our attention to the opinion of Judge Learned Hand, dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (2d Cir. 1943). In his opinion in that case, Judge Hand explained that a lower court should not feel obliged to follow a higher court decision "in the face of changes plainly foreshadowed," simply because the higher court decision has not yet been explicitly overruled. While that proposition may be sound in extreme cases, we do not agree with counsel that it applies to this case. Here, unlike in the case

Judge Hand put, we do not believe the change the government anticipates is "plainly foreshadowed."

Although the Supreme Court may yet reconsider the *Thames & Mersey* decision, and with it the Court's traditional analysis of the Export Clause, we do not feel free in this case to take the extraordinary step of disregarding a higher court decision that all agree is binding precedent if it is still valid. Thus, the precedent that seems to us most pertinent is not Judge Hand's dissent in the *Spector Motor* case, but the Supreme Court's own more recent directive to inferior courts, in *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989):

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

In light of that instruction, and the undisputed applicability of *Thames & Mersey* to the tax imposed in this case, we conclude that our duty is to follow *Thames & Mersey* and hold Section 4371 invlaid as applied.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 388-89T

(Filed: June 23, 1994)

INTERNATIONAL BUSINESS MACHINES CORPORATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Taxation: Excise Tax on Foreign Insurers; Export Clause (Art. I, § 9, cl. 5)

OPINION

LYDON, Senior Judge:

In this litigation, International Business Machines Corporation (IBM) seeks to recover deficiencies assessed by the Internal Revenue Service after the Service determined that IBM failed to pay a four percent excise tax on premiums paid to foreign insurers that issued policies covering products IBM sold to its foreign subsidiaries. No facts are in dispute, and each party has moved for summary judgment. The issue presented in the summary judgment motions is whether the excise tax on foreign insurance premiums violates the constitutional prohibition against taxing exports. Because the court agrees with IBM that the tax at issue

in this case is prohibited by the Constitution, the court grants summary judgment in favor of IBM.

I

Sales of IBM Products Outside the United States

The following facts have been stipulated by the parties or are otherwise undisputed. IBM is a domestic corporation incorporated under the laws of the State of New York, whose principal place of business is in Armonk, New York. IBM is a developer and manufacturer of sophisticated information processing systems and related products, sold throughout the world. During the tax years at issue in this case, 1975-84, sales of IBM products outside the United States were made through a worldwide network of more than one hundred wholly owned foreign subsidiary corporations. IBM products sold by foreign subsidiaries were manufactured either in their own overseas plants (or in the plants of other IBM foreign subsidiaries) or by IBM at manufacturing plants in the United States.

During the tax years in issue, IBM products manufactured in the United States and sold outside the United States through foreign subsidiaries included (but were not limited to) the following items, manufactured at the locations indicated:

Product:	Manufacturing Locations:
Mainframe computers	Poughkeepsie, NY
Tape drivers, large printers, magnetic tape	Tucson, AZ
Disc drives	San Jose, CA
Copiers, toner, supplies	Boulder, CO
Intermediate computers	Rochester, MN, Austin, TX

Personal computers, keyboards	Austin, TX, Boca Raton, FL
Point of sale banking machines, circuit cards	Charlotte, NC
Communication devices, cathode ray terminals	Raleigh, NC
Semiconductors	Manassas, VA, East Peekskill, NY, Burlington, NY
Large circuit boards, specialized intermediate computers	Endicott, NY

Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders. Depending upon the particular product, IBM would fill a subsidiary's order either by (1) building the product to particular specifications contained in a purchase order ("built to order"), or (2) utilizing ongoing production at a factory or inventory warehouse ("built to plan").

Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were destined for a United States airport (typically, John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the

Far East), but some shipments were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for two to five days, but could remain while awaiting space on an airliner for as long as thirty days. The products would be reloaded at the freight forwarders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, they were unloaded, cleared customs, and loaded on trucks for shipment to their final destination.

When foreign subsidiaries purchased IBM products from IBM during the years in issue, the terms of sale called for title to the products (and the risk of loss) to pass from IBM to the subsidiary when the goods cleared customs in the foreign country. The terms of sale also called for the purchasing subsidiary to bear the cost of insuring the products against damage or destruction during shipment.

Insurance Covering the Shipment of IBM Products Sold to Foreign Subsidiaries

All U.S.-manufactured products IBM sold to foreign subsidiaries were covered by casualty insurance against damage or destruction during shipment. Insurance was "point to point," that is, it covered the risk of loss to goods during transportation by surface or air transportation from the IBM facility in the United States until delivered to the foreign customer or a foreign consolidation center. In some cases, IBM arranged for the insurance; when it did so, insurance was placed with a U.S. insurance carrier, and the cost was billed to the foreign subsidiary. In other instances, the foreign subsidiary placed the insurance; when it did so, the insurance often was with a foreign carrier, which the subsidiary paid for directly. In all cases, both IBM

and its foreign subsidiary were listed as insured beneficiaries.

When a foreign subsidiary obtained its own insurance coverage with a foreign insurer, the policy covered not only shipments to it by IBM from the United States, but shipments of goods purchased from foreign affiliates in other countries as well. The insurer would charge a separate premium to cover each shipment, the amount of which was determined by multiplying the declared value of the particular shipment by the premium rate applicable to that shipment. The premium rate depended on such underwriting factors as the place of origin and destination of the goods, the type of goods involved and how they were packaged, the time and distance of the trip, the route and mode of transportation, and the amount of material handling expected during the trip.

If damage to an IBM product being shipped to a foreign country occurred while IBM had title to the goods (and the risk of loss), then IBM would be entitled to the insurance proceeds under the insurance policy (whether issued by a U.S. company or a foreign insurer). If the loss occurred, however, after the importing foreign subsidiary acquired title to the products, the insurance proceeds would be payable to the subsidiary. In the latter case, the subsidiary would use the proceeds to pay IBM the full purchase price of the damaged products, or to reimburse itself for the purchase price if IBM had already been paid. Since most IBM products shipped to foreign subsidiaries were packaged in containers, damage was frequently not discovered until after the products arrived at their destination. As a practical matter, it was often impossible to determine when a loss occurred and therefore who was legally entitled to receive the policy proceeds. In most cases involving foreign insurance carriers, therefore, the insurance company simply paid the insurance

proceeds to the foreign subsidiary which used the proceeds to pay IBM for the goods.

The Service's Position During the Audits

For the tax periods at issue in this litigation, each quarter during the years 1975 through 1984, IBM filed federal excise returns that did not report any liability under § 4371 of the Internal Revenue Code of 1954, a four percent excise tax on premiums paid for certain policies of insurance issued by foreign insurers. On audit, the Service determined that IBM was liable for the § 4371 tax as a result of the policies purchased from foreign insurance companies insofar as those policies applied to IBM products being exported from the United States.

As part of the audit process, IBM requested the Service's District Director to seek technical advice from the Service's National Office on whether the § 4371 tax as applied to IBM's exports was in violation of Article I, § 9, clause 5 of the United States Constitution, which will be referred to throughout this opinion as the Export Clause. In a Technical Advice Memorandum dated May 12, 1982, the National Office rejected IBM's constitutional argument on the grounds that the § 4371 tax was not a "tax" within the meaning of the Export Clause because the primary object of the tax statute was regulatory as opposed to revenue-raising.

On reconsideration, the Service issued a second Technical Advice Memorandum, dated November 6, 1984, reaffirming its earlier position and adding a second argument, that the Export Clause did not restrict application of the § 4371 tax because the incurred risks included some transportation within the United States. The Service found that the Export Clause had no application at all to an export voyage if some portion of the total voyage included an intra-U.S. transportation leg. Because the insurance policies in question here covered not just the

overseas portion of the export shipments but also the inland leg from the IBM manufacturing facilities to the U.S. air or sea port, the Service concluded that the Export Clause had no application to any of the shipments. Presently, the government is not relying on the positions advanced by the Service described above.

The Assessments

The Service determined that the premiums paid to foreign insurers with respect to U.S. manufactured IBM products sold to its foreign subsidiaries were subject to the tax imposed by § 4371. During the audit, IBM sent questionnaires to its foreign subsidiaries and determined that the premiums paid by them to foreign insurers during the year 1980, allocable to U.S.-manufactured IBM products sold outside the United States, totaled $2,065,137. For expediency in making assessments under § 4371, IBM and the Service agreed that the foreign insurance premiums attributable to such products in each of the years 1975-79 and 1981-84 were the same as the premiums paid in 1980. Accordingly, the Service assessed § 4371 taxes of $82,605 per year (a figure calculated by multiplying the annual premiums by four percent), along with interest and delinquency penalties for each quarter in issue. IBM paid its assessments in full, and timely filed claims for refund. The Service denied these claims on December 23, 1988. IBM timely filed its action in this court on July 11, 1989. Since then, the government has since abated the penalty assessments and refunded the amounts so assessed to IBM, with interest. The assessments for tax and interest, which are still in dispute, total $1,532,235.87.

The Present Motions

The sole question presented by the motions for summary judgment is whether § 4371 is constitutionally impermissible, given the facts agreed to by the parties. Article I, section 9, clause 5 of the United States Constitution, the Export Clause, provides: "No Tax or Duty shall be laid on Articles exported from any State." This provision was intended to free all exportations from the burdens of national taxation.

Section 4371 provides:

> There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by a foreign insurer or reinsurer, a tax at the following rates:
>
> (1) Casualty insurance and indemnity bonds.—4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);

The parties appear to agree that as the terms "foreign insurer," "policy of casualty insurance," and "insured" are defined in § 4372, the premiums on casualty insurance that IBM purchased are facially subject to the tax imposed by § 4371.

II

A. IBM's Argument

IBM directs the court's attention to *Thames & Mersey Marine Insurance, Co. v. United States*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821 (1915), cited for the holding that the Export Clause prohibits the levying of taxes on policies of marine insurance on exports.

In *Thames & Mersey*, the taxpayer sought to recover amounts it paid in stamp taxes on policies insuring exports against marine risks. In its analysis, the Court turned quickly to *United States v. Hvoslef*, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813 (1915), a case decided two weeks before *Thames & Mersey*. In *Hvoslef*, the Court invalidated a tax levied on charter parties which were exclusively for the carriage of cargo from state ports to foreign ports because the tax was essentially a tax on exports. The *Thames & Mersey* court said that its issue followed directly, for the question presented by both *Hvoslef* and *Thames & Mersey* was: "Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition?" *Thames & Mersey*, 237 U.S. at 25, 35 S.Ct. at 498. Put another way by the Court, the constitutionality of this tax depended on "whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself." *Id.* at 26, 35 S.Ct. at 498. Answering this question by examining "the exigencies of trade [to] determine what is essential to the process of exporting," the Court held that marine insurance policies are so vitally connected to the export process that a tax on the policies amounts to a tax on the exports themselves, in contravention of the Export Clause. *Cf. Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862 (1901) (stamp tax on bill of lading for exported goods is in effect a tax on the articles included in the bill of lading, and is therefore a tax on exports).

The second prong of IBM's contention is that as far as certain taxes are proscribed by the Export Clause of the Constitution, § 4371 is such a tax. IBM states that the predecessor of § 4371 was a stamp tax enacted as part of a comprehensive wartime revenue

bill, the Revenue Act of 1918. Ch. 18, § 1107, 40 Stat. 1057, 1138. The excise tax on foreign insurers was re-enacted as part of a World War II revenue bill, the Revenue Act of 1942. Ch. 619, § 502, 56 Stat. 798, 955. A House report discussing this revenue measure, cited by IBM, stated: "It is believed that the revised provision will yield an appreciable amount of revenue, and at the same time eliminate an unwarranted competitive advantage now favoring foreign insurers [who are not subject to income tax]." H.R.Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942).

Finally, IBM argues that export protection begins as soon as goods enter the "export stream," and accordingly the prohibition against taxation that burdens exports extends to the payment of taxes on premiums by IBM in this case. The "export stream" is the final, continuous journey out of the country, and tax immunity attaches as soon as the journey begins. *Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 752, 98 S.Ct. 1388, 1400, 55 L.Ed.2d 682 (1978). Referring again to *Thames & Mersey*, IBM argues that the payment of these taxes is so directly and closely related to the process of exporting that the tax is in substance a tax upon the exportation, and thus constitutionally prohibited. Section 4371, argues IBM, falls outside the spirit of the Supreme Court's thoughts in *Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862 (1901). There, the court stated:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden . . . . [I]t is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Id. at 292-93, 21 S.Ct. at 652.

B. The Government's Argument

As mentioned previously, the government is not presently advancing the two positions defended by the Service's National Office that it took on § 4371 during the audit process, namely, that § 4371 does not impose a tax that has any constitutional ramifications because its primary purpose is regulatory instead of revenue-raising, and that *Thames & Mersey* is distinguishable because these shipments were not pure exportation in that they included an inland leg from a plant inside the United States to a port.

In its cross-motion, the government does not disagree with the admonition in *Fairbank* that exports cannot be burdened by taxation that interferes with the export process. Where IBM goes astray, argues the government, is in its argument that *Thames & Mersey* controls this case. The government says that *Thames & Mersey* is silent on the question of whether the excise tax imposed by § 4371 targeted exports in a discriminatory fashion or whether the tax was facially neutral in this regard. The thrust of the government's motion for summary judgment is that *Thames & Mersey* has been superseded by Supreme Court decisions that have shifted the critical "Export Clause" question to whether a tax discriminates against exports in their capacity as exports.

The government's argument is premised on its interpretation of two related Supreme Court decisions. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), the State of Georgia assessed ad valorem property taxes against Michelin's inventory of imported tires and tubes. Michelin argued that the ad valorem tax was prohibited by the "Import-Export Clause" of the Constitution, Article I, § 10, clause 2, which provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for

executing its own inspection Laws. . . ." The Court rejected Michelin's proposition, stating: "Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property which is also imposed on imported goods that are no longer in transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.* at 286, 96 S.Ct. at 541.

Critical to the Court's holding in *Michelin* was its discussion of *Low v. Austin*, 80 U.S. (13 Wall.) 29, 20 L.Ed. 517 (1872). The Court characterized Low as "the leading decision of this Court holding that the States are prohibited by the Import-Export Clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports and become incorporated into the mass of property in the State." *Michelin*, 423 U.S. at 282, 96 S.Ct. at 539. Low, the Court continued, improperly expanded the prohibition of the Import- Export Clause, rejecting the more reasoned views expressed by Justice Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827), and Justice Taney in the *License Cases*, 46 U.S. (5 How.) 504, 12 L.Ed. 256 (1847), that an examination of the origins of the Clause "makes crystal clear that the prohibition applied only to state exactions upon imports as imports and did not apply to nondiscriminatory ad valorem property taxes." *Michelin*, 423 U.S. at 300, 96 S.Ct. at 547. Accordingly, the Court found that Low was wrongly decided and explicitly overruled it. *Id.* at 301, 96 S.Ct. at 548.

What in *Michelin* the Supreme Court said about the taxation of imports *qua* imports, it extended to the taxation of exports *qua* exports in *Washington Stevedoring*. There, the Court resumed a discussion it began in *Michelin*. The Court noted that "*Michelin* initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it

analyzed the nature of the tax to determine whether it was an 'Impost or Duty.'" *Washington Stevedoring*, 435 U.S. at 752, 98 S.Ct. at 1400. The import tax in *Michelin* was upheld because it did not offend the three main concerns of the Framers of the Import-Export Clause: the government speaking with one voice when regulating commercial relations with foreign governments; preventing federal sources of import revenues from being diverted to the states; and preventing states from levying taxes on citizens of other states by taxing goods merely flowing through their ports to other states.

Although the Court in *Washington Stevedoring* recognized that there were some formal factual distinctions between it and *Michelin*, it extended the *Michelin* "three concerns" analysis to taxation involving exports. The Court pointed out that an export tax need only be measured against the first and third concerns: the export-tax ban of the Import-Export Clause does not serve the second concern, protection of federal revenues, because that objective is satisfied by the Export Clause of Article I, § 9. In sum, the Court decided that an export tax should be tested for its conformance with the first and third policies of the Import-Export Clause, and if the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" prohibited by the Constitutional ban.

Among the distinctions drawn by the *Washington Stevedoring* Court between its facts and those in Michelin was that in *Michelin* the tax fell on the goods themselves, whereas in *Washington Stevedoring* the tax fell on stevedoring, the business of loading and unloading ships. The Court noted that a tax on stevedoring does not relate to the value of the goods being transported, and therefore cannot be considered a tax on the goods themselves. *Id.* at 757, 98 S.Ct. at 1402. To reach this conclusion, *Washington Stevedoring* turned briefly to *Canton Railroad*

Co. v. Rogan, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488 (1951), in which the Court upheld a gross-receipts tax on a railroad that engaged in a variety of services relating to importing and exporting on the grounds that the immunity of services incidental to exporting and exporting was not as broad as the immunity of the goods themselves, a distinction described in Canton Railroad that found favor in *Washington Stevedoring*.

Of course, no bright-line test for distinguishing between goods and related services emerged from *Canton Railroad*, but as the Court in *Washington Stevedoring* noted, *Canton Railroad* did distinguish the tax it upheld from other taxes which the Court had previously invalidated. Among the cases distinguished was *Thames & Mersey*. In the words of the *Washington Stevedoring* Court:

> In [the cases in which the Court had previously struck down taxes,] the State had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves. . . . [T]he stamp tax on bills of lading in Fairbank effectively taxed the goods because the bills represented the goods. The basis for distinguishing Thames & Mersey is less clear because there the tax fell upon marine insurance policies. Arguably, the policies had a value apart from the value of the goods. In distinguishing that case from the taxation of stevedoring activities, however, one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships.

Washington Stevedoring, 435 U.S. at 756 n. 21, 98 S.Ct. at 1402 n. 21.

In its motion, the government suggests that a reading of *Washington Stevedoring* and the cases

leading up to it indicates that there has been a fundamental revision in the way the Supreme Court approaches cases that invoke both the Import-Export Clause and the Export Clause. It argues that there is no meaningful difference between a tax on the proceeds of stevedoring services and a tax on premiums paid for policies of casualty insurance, a transaction the government describes as being incidental to the process of exporting. Taking its cue from *Michelin*, the government says that as applied to IBM in this case the § 4371 tax is "non-discriminatory" because it doesn't "discriminate" against exports, *i.e.*, the tax doesn't target exports as exports but instead is a generally applicable tax on insurance policies written by foreign insurers that applies regardless of whether the insured goods are in the export stream, and because the tax as such is "non-discriminatory" it does not run afoul of the Export Clause.

III

Having carefully considered the parties' briefs and the cases relied on therein, the court cannot agree with the government that *Michelin* and *Washington Stevedoring* control the facts of this case. Plainly enough, the parties agree that § 4371 imposes a "tax," as that term is generally used and understood. And, the court agrees with IBM that the tax imposed by § 4371 is a tax that amounts to a tax on exports. That the imposition of an excise tax on insurance that must be purchased to secure against the risks amounts to a tax on the goods themselves was recognized years ago by the Supreme Court, which wrote that "[i]t cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis." *Thames & Mersey*, 237 U.S. at 26, 35 S.Ct. at 498.

Thus, because the § 4371 tax is essentially a burden on the exportation process under the rule of *Thames & Mersey*, to avoid application of the rule and prevail on its motion the government must demonstrate either that *Thames & Mersey* has been explicitly overruled, or if it has not been, that later precedent more properly controls. The court does not think that the government has successfully demonstrated either of these propositions.

The government argues that *Thames & Mersey* has been overruled because *Washington Stevedoring* overruled its decisions in *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993 (1947), two cases in which the Court invalidated state taxes on the proceeds from stevedoring interstate and international cargoes because they violated the Import-Export Clause. A partial dissent and partial concurrence in *Carter & Weekes* held that the Import-Export Clause prevented the stevedoring tax from applying to cargoes to and from foreign ports, invoking *Thames and Mersey* as grounds for its conclusions regarding exports. The government maintains that because *Washington Stevedoring* overruled *Carter & Weekes*, then *Thames & Mersey* must also have been overruled.

The court rejects this argument. *Carter & Weekes* was explicitly overruled in *Washington Stevedoring*. The Court in Michelin wrote many pages to explain in detail why it was overruling the long-standing rule of *Low v. Austin*. *Washington Stevedoring* does specifically overrule two cases and endorses a new way of examining cases that involve the Import-Export Clause, but the court does not read *Washington Stevedoring* as stating that the Court has abandoned the rule it expanded in *Thames & Mersey* in an analysis of the Export Clause. The court must adhere to the accepted practice of

following Supreme Court precedent unless the Supreme Court clearly states that it is overruling earlier cases and explains why it is doing so. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") Washington Stevedoring overruled two prior decisions that relied on the Import-Export Clause to invalidate taxes on stevedoring. In the absence of explicit instruction from the Supreme Court that its long-standing approach to evaluating challenges under the Export Clause should be disregarded, the court declines to presume that such an instruction has been implicitly given.

Furthermore, the court is not inclined to read *Washington Stevedoring* as overruling *Thames & Mersey* when the Court in *Washington Stevedoring* cites *Thames & Mersey* as a precedential case that in the present context had to be distinguished. In its discussion of *Canton Railroad*, the Court in *Washington Stevedoring* drew parallels to that earlier case, noting that:

> [t]axation in neither [stevedoring nor railroad services] relates to the value of goods, and therefore in neither can it be considered taxation on the goods themselves. The force of *Canton R. Co.* therefore prompts the conclusion that the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value.

Washington Stevedoring, 435 U.S. at 757, 98 S.Ct. at 1403. Clearly, the Court no longer considers a tax on stevedoring to be a tax on exports because stevedoring is a service whose value is not necessarily tied to the value of the goods it serves. In that same discussion, however, the Court distinguished a tax on stevedoring from the tax on the marine insurance policies invalidated in *Thames & Mersey*, stating that "the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* at 756 n. 21, 98 S.Ct. at 1402 n. 21.

Thus, even if the government is correct in its assertion that all taxes that involve exports, whether considered in light of the Export Clause or the Import-Export Clause, should be examined to see if they discriminate against exports *qua* exports, it appears that in the Court's view a tax such as that imposed by § 4371 could indeed be considered a tax on exports in their capacity as exports. The present case is distinguishable from *Michelin* and *Washington Stevedoring*: in *Michelin* the tires had left the import stream and were held to be beyond the import stream and thus outside the scope of the Import-Export Clause, and in *Washington Stevedoring* the Court said that the Import-Export Clause was not violated because stevedoring bore no significant relationship to the goods transported. In the present case, the casualty insurance policies were at all times within the export stream and were significantly related to the exportation process. Whether the § 4371 tax would be impermissible even without the support of *Thames & Mersey* is, we realize, not stated dispositively by the Court, but there is nothing in *Washington Stevedoring* that indicates that *Thames & Mersey* and the connection drawn in that case between insurance policies and the value of goods have been banished into irrelevance.

IV

For the reasons discussed above, the court finds that the § 4371 tax imposed on IBM violates the terms of the Export Clause. Plaintiff's motion for summary judgment is granted, and defendant's motion for summary judgment is denied. The parties are directed to confer and agree on the judgment award that should be entered in favor of the plaintiff. The parties shall advise the court in this regard within thirty days.

/s/ Thomas J. Lydon
THOMAS J. LYDON
Senior Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 94-5164

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 388-89T

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: July 10, 1995 /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

ISSUED AS A MANDATE: August 31, 1995

APPENDIX D

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 388-89T

INTERNATIONAL BUSINESS MACHINES CORPORATION

v.

THE UNITED STATES

[Filed Aug. 31, 1994]

AMENDED JUDGMENT

Pursuant to the court's opinion of July 28, 1994, granting plaintiff's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $1,532,235.87 which covers the assessed taxes and interest, covering tax years 1975-1984 in the manner set forth in the attached exhibit which is incorporated and made part of the judgment herein, plus statutory interest on such assessed taxes and interest as provided by law. No costs.

David A. Lampen
Clerk of Court

August 31, 1994 By: /s/ Jack L. Wilson
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies listing of all plaintiffs. Filing fee is $105.00.

JOINT EXHIBIT 1—ASSESSED TAXES AND INTEREST

Tax Period Ending	Assessed Taxes	Assessed Interest	Total Taxes & Interest
1975			
7503	$20,651.36	$30,543.93	$51,195.29
7506	$20,651.36	$26,386.76	$27,038.13
7609	$20,651.36	$29,363.91	$50,015.27
7512	$20,651.36	$23,955.36	$44,606.73
1976			
7603	$20,651.36	$23,322.29	$43,973.65
7606	$20,651.36	$28,447.95	$49,099.31
7609	$20,651.36	$27,926.69	$48,578.05
7612	$20,651.36	$27,405.42	$48,056.78
1977			
7703	$20,651.36	$23,918.53	$44,569.89
7706	$20,651.36	$3,839.82	$24,491.18
7709	$20,651.36	$25,841.60	$46,492.96
7712	$20,651.36	$25,335.20	$45,986.56
1978			
7803	$20,651.36	$24,893.20	$45,544.56
7806	$20,651.36	$24,426.67	$45,078.04
7809	$20,651.36	$23,979.91	$44,631.27
7812	$20,651.36	$23,547.65	$44,199.02
1979			
7903	$20,651.36	$23,105.65	$43,757.02
7906	$20,651.36	$22,312.73	$42,964.09
7909	$20,651.36	$22,206.98	$42,858.35
7912	$20,651.36	$21,756.45	$42,407.82
1980			
8003	$20,651.36	$20,862.35	$41,513.71
8006	$20,651.36	$19,474.73	$40,126.09
8009	$20,651.36	$19,076.15	$39,727.51
8012	$20,651.36	$18,042.93	$38,694.29
1981			
8103	$20,651.36	$17,293.80	$37,945.16
8106	$20,651.36	$16,191.82	$36,843.18
8109	$20,651.36	$15,504.85	$26,156.22
8112	$20,651.36	$14,603.69	$35,255.05
1982			
8203	$20,651.36	$13,134.56	$33,785.93
8206	$20,651.36	$11,648.71	$32,300.07
8209	$20,651.36	$10,135.65	$30,787.02
8212	$20,651.36	$8,737.56	$29,388.93
1983			
8303	$20,651.36	$7,624.69	$28,276.05
8306	$20,651.36	$6,623.02	$27,274.38
8309	$20,651.36	$5,872.56	$26,523.93
8312	$20,651.36	$5,155.71	$25,807.07
1984			
8403	$20,651.36	$4,412.53	$25,063.89
8406	$20,651.36	$3,779.75	$24,431.11
8409	$20,651.36	$3,082.96	$23,734.33
8412	$20,651.36	$2,406.60	$23,057.96
Total	$826,054.55	$706,181.33	$1,532,235.87

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 388-89T
(Senior Judge Thomas J. Lydon)

INTERNATIONAL BUSINESS MACHINES CORPORATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

STIPULATION OF FACTS

The parties hereby stipulate that the following facts, including the attached Joint Exhibit 1, may be accepted as true for purposes of this case. The parties believe that this stipulation of facts is comprehensive, that no genuine issues of material fact exist, and that the case may be resolved on cross motions for summary judgment. Nevertheless, the parties reserve the right to introduce other evidence that is not inconsistent with the facts stipulated. The parties also reserve the right to object to the relevance, materiality, and admissibility of any of the stipulations or the attached exhibit.

PROCEDURAL BACKGROUND

1. Plaintiff, International Business Machines Corporation (IBM), is a domestic corporation incorporated under the laws of the State of New York. IBM's principal place of business is in Armonk, New York.
2. This case involves the four percent federal excise tax imposed by Section 4371(1) of the

Internal Revenue Code (26 U.S.C.) on premiums paid for certain policies of insurance issued by foreign insurers.

3. The periods involved are each of the quarters during the years 1975 through 1984, inclusive (the "quarters in issue").
4. IBM filed federal excise returns for the quarters in issue that did not report any liability under Section 4371.
5. On audit of IBM's federal excise tax returns for the quarters in issue, the Internal Revenue Service ("IRS") determined that IBM was liable for the tax imposed by Section 4371 as a result of certain foreign insurance transactions hereafter described. The IRS assessed IBM for Section 4371 taxes, interest, and "delinquency" or "failure to pay" penalties for each of the quarters in issue (the "assessments").
6. IBM paid the assessments in full, and timely filed claims for refund with the IRS for all amounts paid in satisfaction of the assessments. The IRS denied IBM's claims for refund on December 23, 1988. This tax refund action was timely filed by IBM on July 11, 1989. The parties believe that this Court has jurisdiction of the action under 28 U.S.C. Section 1491(a)(1) and Section 7422 of the Internal Revenue Code (the "Code") (26 U.S.C. Section 7422).
7. Defendant has abated the IRS' penalty assessments and refunded the amounts so assessed to IBM, with interest.

SALES OF IBM PRODUCTS OUTSIDE THE UNITED STATES

8. IBM is a developer and manufacturer of sophisticated information processing systems and related products, sold throughout the

world. During the quarters in issue, sales of IBM products outside the United States were made through a worldwide network of more than 100 wholly owned foreign subsidiary corporations. For example, IBM products were sold using the quarters in issue by corporations organized and operating in Abu Dhabi, Argentina, Belgium, Brazil, Canada, Egypt, Germany, Haiti, India, Japan, Kuwait, Malaysia, Norway, Peru, South Africa, Switzerland, Thailand, the former U.S.S.R., Vietnam, and Zambia.

9. IBM products sold by foreign subsidiaries were manufactured either in their own overseas plants (or in the plants of other IBM foreign subsidiaries) or by IBM at manufacturing plants in the United States.

10. During the quarters in issue, IBM products manufactured in the United States and sold outside the United States through foreign subsidiaries included (but were not limited to) the following items, manufactured at the locations indicated:

Product:	Manufacturing Locations:
Mainframe computers	Poughkeepsie, NY
Tape drivers, large printers, magnetic tape	Tucson, AZ
Disc drives	San Jose, CA
Copiers, toner, supplies	Boulder, CO
Intermediate computers	Rochester, MN, Austin, TX

Personal computers, keyboards	Austin, TX, Boca Raton, FL
Point of sale banking machines, circuit cards	Charlotte, NC
Communication devices, cathode ray terminals	Raleigh, NC
Semiconductors	Manassas, VA, East Peekskill, NY, Burlington, NY
Large circuit boards, specialized intermediate computers	Endicott, NY

11. Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders.

12. Depending upon the particular product, IBM would fill a subsidiary's order either by (1) building the product to the particular specifications contained in a purchase order ("build to order"), or (2) utilizing ongoing production at a factory or inventory at a warehouse ("built to plan").

13. Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were

destined for a United States airport (typically, John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the Far East), but some shipments also were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for 2-5 days, but could remain while awaiting space on an airliner for as long as 30 days. The products would be reloaded at the freight forwarders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, there were unloaded, cleared customs, and loaded on trucks for shipment to their final destination. For purposes of the parties' cross motions for summary judgment, the parties agree that any variations from these typical fact patterns were not significant and are not relevant to the resolution of the motions.

14. When foreign subsidiaries purchased IBM products from IBM during the years in issue, in terms of sale called for title to the products (and the risk of loss) to pass from IBM to the subsidiary when the goods cleared customs in the foreign country. The terms of sale also called for the purchasing subsidiary to bear the cost of insuring the products against damage or destruction during shipment.

INSURANCE COVERING THE SHIPMENT OF IBM PRODUCTS SOLD TO FOREIGN SUBSIDIARIES

15. All U.S.-manufactured products IBM sold to foreign subsidiaries were covered by casualty insurance against damage or destruction during shipment. Insurance was "point to point", that is, covered the risk of loss to goods during transportation by surface or air transportation from the IBM facility in the United States until delivered to the foreign customer or a foreign consolidation center. In some cases, IBM arranged for the insurance; when it did so, insurance was placed with a U.S. insurance carrier, and the cost was billed to the foreign subsidiary. In other instances, the foreign subsidiary placed the insurance; when it did so, the insurance often was with a foreign carrier, which the subsidiary paid for directly. In all cases, both IBM and its foreign subsidiary were listed as insured beneficiaries.

16. When a foreign subsidiary obtained its own insurance coverage with a foreign insurer, the policy covered not only shipments to it by IBM from the United States, but shipments of goods purchased from foreign affiliates in other countries as well. The insurer would charge a separate premium to cover each shipment, the amount of which was determined by the declared value of the particular shipment, multiplied by the premium rate applicable to that shipment. The premium rate depended on such underwriting factors as the place of origin and destination of the goods, the type of goods involved and how they were packaged, the time and distance of the trip, the route and mode(s) of transportation, and the amount of material handling expected during the trip.

17. If damage to an IBM product being shipped to a foreign country occurred while IBM had title to the goods (and the risk of loss), then IBM

would be entitled to the insurance proceeds under the insurance policy (whether issued by a U.S. company or a foreign insurer). If the loss occurred, however, after the importing foreign subsidiary acquired title to the products, the insurance proceeds would be payable to the subsidiary. In the latter case, the subsidiary would use the proceeds to pay IBM the full purchase price of the damaged products, or to reimburse itself for the purchase price, if IBM had already been paid.

18. Since most IBM products shipped to foreign subsidiaries were packaged in containers, damage was frequently not discovered until after the products arrived at their designation. As a practical matter, it was often impossible to determine when a loss occurred and therefore who was legally entitled to receive the policy proceeds. In most cases involving foreign insurance carriers, therefore, the insurance company simply paid the insurance proceeds to the foreign subsidiary which used the proceeds to pay IBM for the goods.

THE ASSESSMENTS

19. The Internal Revenue Service determined that the premiums paid to foreign insurers with respect to U.S. manufactured IBM products sold to its foreign subsidiaries were subject to the four percent excise tax imposed by Section 4371 of the Internal Revenue Code (26 U.S.C.).

20. During the audit, IBM sent questionnaires to its foreign subsidiaries and determined that premiums paid by them to foreign insurers during the year 1980, allocable to U.S.-manufactured IBM products sold outside the United States, totaled $2,065,137. For expediency in making assessments under Section 4371, IBM and the IRS agreed that the foreign

insurance premiums attributable to such products in each of the years 1975-1979 and 1981-1984 were the same as in 1980. Accordingly, the Internal Revenue Service assessed Section 4371 taxes of $82,605 per year, calculated by multiplying the annual premiums by four percent.

21. The Internal Revenue Service's assessments of Section 4371 tax and interest for each of the quarters in issue, which are the amounts in this case, are set forth in Joint Exhibit 1.

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 95-591

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

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November 1995

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QUESTION PRESENTED

Whether the lower courts correctly ruled that the Export Clause of the U.S. Constitution precluded the application of § 4371 of the Internal Revenue Code to premiums paid for casualty insurance on respondent's export shipments. To accept the Government's argument that the lower courts erred in so ruling, this Court would have to overrule *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915).

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties. International Business Machines Corporation has no parent corporations and no subsidiary corporations that are not wholly owned.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-591

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

STATEMENT

Respondent International Business Machines Corporation (IBM) brought this suit in the United States Court of Federal Claims to obtain a refund of $826,054.55 in taxes assessed under § 4371 of the Internal Revenue Code. (App. 33a)[1] Section 4371 (26 U.S.C. § 4371) imposes a tax of four cents per dollar on insurance premiums paid to a foreign insurer for risks or losses wholly or partly within the United States. *See* 26 U.S.C. §§ 4371 & 4372. As an exporter of computers and other business products, IBM purchased — either directly or through its foreign subsidiaries — casualty insurance to protect against the risk of loss or damage to its products

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[1] The amount of $1.5 million referenced in the Government's petition (Pet. 4) includes both taxes *and interest* covering a ten-year period. (*See* App. 33a) Thus, even for a major exporter such as IBM, the taxes claimed by the Government amounted to only about $82,000 per year.

during the export process. The insurance was "point to point"; that is, it applied to each shipment from the time it left IBM's facility in the United States until arrival at the foreign destination.[2] When the insurance was purchased by a foreign subsidiary, a foreign insurance company would typically issue the policy, and thus the statutory language of § 4371 was triggered.[3]

Eighty years ago, this Court held in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), that a very similar federal tax levied against premiums paid for marine casualty insurance was unconstitutional as applied to export shipments. The reason was the Export Clause of the Constitution: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Court in *Thames & Mersey* concluded that a tax upon insurance policies covering export shipments was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition . . . ." 237 U.S. at 25, *quoting United States* v. *Hvoslef*, 237 U.S. 1, 13 (1915). Based on the authority of *Thames & Mersey*, IBM took the position that

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[2] IBM exported products to diverse countries around the world, including Abu Dhabi, Argentina, Belgium, Brazil, Canada, Egypt, Germany, Haiti, India, Japan, Kuwait, Malaysia, Norway, Peru, South Africa, Switzerland, Thailand, the former U.S.S.R., Vietnam, and Zambia. The insurance applied during the inland leg in the United States, the overseas portion of the journey, and the inland segment within the foreign country, but in all cases insurance coverage did not commence until the shipment had been tendered in the United States to a common carrier for direct shipment abroad. App. 36a-39a.

[3] The tax applies where the insured risk is "wholly or partly" within the United States. 26 U.S.C. § 4372(d). The Government has construed this to mean that the tax thus applies to the entirety of an international shipment so long as there is more than a "trifling" portion of the risk within the United States. *See* Rev. Rul. 57-256, 1957-1 C.B. 416.

§ 4371 could not constitutionally be applied to casualty insurance premiums for its export shipments.

After audit of IBM's tax returns for the years 1975 through 1984, however, the Internal Revenue Service maintained that IBM was liable for the § 4371 tax insofar as the policies purchased from foreign insurers applied to IBM's exports from the United States. (App. 17a) As part of the audit process, IBM requested the IRS District Director to seek technical advice from the Service's National Office on IBM's position that the § 4371 tax as so applied was in violation of the Export Clause. The National Office rejected IBM's position, maintaining that *Thames & Mersey* was distinguishable for two reasons: first, that § 4371 was a regulatory measure rather than a "tax" within the meaning of the Export Clause,[4] and, second, that the Export Clause did not apply on the facts here because the insured risks included the intra-U.S. transportation leg of the export journey.[5]

Once IBM filed suit for refund, the Government abandoned the IRS position that *Thames & Mersey* was distinguishable. In both the Court of Federal Claims and the Federal Circuit, the Government conceded that — if the Export Clause

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[4] App. 17a. This argument was based on holdings that the Export Clause does not prohibit user fees or other charges that are designed to defray federal governmental expenses specifically associated with export of the products in question. *E.g.*, *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595-96 (1884); *Pace* v. *Burgess*, 92 U.S. 372, 375 (1875); *Moon* v. *Freeman*, 379 F.2d 382, 391-92 (9th Cir. 1967). Here, however, § 4371 is clearly a general revenue provision -- not a user fee -- a view that the Government ultimately accepted. See pp. 3-4 *infra*.

[5] App. 17a. This position was squarely at odds with this Court's holdings that the protection of the Export Clause attaches as soon as goods have started their export journey, even if still within the United States. *E.g.*, *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 69-70 (1923); *Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886). *See also United States* v. *Gosho Co.*, 23 F.2d 675 (5th Cir. 1928).

had been correctly interpreted and applied in *Thames & Mersey* — then the tax here was also unconstitutional as applied and that IBM was entitled to a full refund. (App. 1a & 22a)

On stipulated facts, the Court of Federal Claims (Senior Judge Thomas J. Lydon) granted IBM's motion for summary judgment and denied the Government's cross-motion. The court held that, on the facts presented, "the tax imposed by § 4371 is a tax that amounts to a tax on exports" (App. 26a); that *Thames & Mersey* was controlling (App. 27a); and that recent Court decisions under the Import-Export Clause[6] could not be read as rejecting this Court's established rulings under the Export Clause (App. 27a). As an alternative ground, Judge Lydon also ruled that the federal tax here and in *Thames & Mersey* were distinguishable from the state taxes upheld in the recent Import-Export Clause rulings:

> "Thus, even if the government is correct in its assertion that all taxes that involve exports, whether considered in light of the Export Clause or the Import-Export Clause, should be examined to see if they discriminate against exports *qua* exports, it appears that in the Court's view a tax such as that imposed by § 4371 could indeed be considered a tax on exports in their capacity as exports"

and thus be unconstitutional as applied. (App. 29a) This was because § 4371 amounted to an ad valorem tax on export goods in transit,[7] a type of tax that this Court's recent Import-Export Clause rulings indicated was distinguishable from the

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[6] Principally *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

[7] The tax imposed by § 4371 varies directly with the declared value of the export shipment. App. 39a.

state taxes that were there upheld. (App. 29a)

The Federal Circuit Court of Appeals affirmed in a unanimous decision by Judge William C. Bryson (Chief Judge Archer and Judge Plager joining). After reviewing the history of the Export Clause, the court of appeals observed: "Acknowledging the importance of the Export Clause and its flat prohibitory language, the Supreme Court has consistently given the Clause a broad construction." (App. 5a) While this Court has in recent years narrowed its construction of the Import-Export Clause applicable to state taxation,

> "[s]upport for the continuing vitality of *Thames & Mersey* can be found both in the Court's Import-Export Clause decisions and in the distinctions in language and policy between the Import-Export Clause and the Export Clause." (App. 9a)

Hence, "[w]hile the Supreme Court may at some point reconsider *Thames & Mersey*" (App. 8a), on the basis of current law and the "undisputed applicability of *Thames & Mersey*" (App. 11a) the § 4371 tax as applied to the facts of IBM's export shipments was unconstitutional.

REASONS FOR DENYING THE WRIT

The Government has failed to justify granting the writ of certiorari. The decisions of both lower courts are correct, for they correctly applied the rulings of this Court in *Thames & Mersey* and in other cases decided under the Export Clause. There is no conflict in the circuits, and indeed no court (or, to our knowledge, any commentator) has suggested that *Thames & Mersey* should be overruled or that this Court's recent decisions under the Import-Export Clause — which has a different text and serves different purposes — should be read as undermining decades of established precedents under the Export Clause. Moreover, as the Court of Federal Claims observed, the result in this case would be unaffected *even if*

the Import-Export Clause analysis were found applicable to challenges to federal taxes under the Export Clause. Finally, no important revenue measure is at stake in this case, and no broad principle applicable to other revenue measures has been established.

1. *The Lower Courts Correctly Applied the Export Clause as Construed in Thames & Mersey and Other Cases, and the Government Has Demonstrated No Basis for Overruling this Court's Precedents Under the Export Clause.*

The Government has conceded throughout this litigation that, if *Thames & Mersey* is good law, IBM is entitled to prevail in its demand for refund.[8] Thus, this is not a case in which a lower court has embraced a novel or questionable principle of constitutional law to invalidate a federal statute. To the contrary, the lower courts correctly applied binding precedents of this Court to find, on the particular facts of this case, that a statute was unconstitutional as applied (but not generally).

The Government argues that *Thames & Mersey* should now be overruled, not because of any new case law under the Export Clause (applicable to federal taxes) but because of recent cases under the Import-Export Clause (applicable to the States),[9] in particular *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). *Michelin* and *Washington Stevedoring* held that the Import-Export Clause did not prohibit the States from applying non-discriminatory taxes to imports and exports, and the

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[8] The position of the IRS that *Thames & Mersey* was distinguishable was abandoned by the Government once IBM filed suit. See pp. 3-4 *supra*.

[9] U.S. Const. art. I, § 10, cl. 2.

Government now argues that the same principle should govern the Export Clause. But *Michelin* and *Washington Stevedoring* provide no support for that view.

In *Michelin*, the Court held that Georgia's ad valorem property tax could be applied to imported goods no longer in transit in the same manner that the tax applied to domestic goods. The Court reasoned that the Import-Export Clause was intended by the Framers to serve three purposes: (1) that the federal government speak with one voice in regulating foreign commerce; (2) that federal import revenues not be diverted to the States; and (3) that state imposts and duties not disrupt harmony among the States, particularly between seaboard and inland states. 423 U.S. at 285-86. A non-discriminatory state property tax, applied equally to domestic and imported goods, did not appear to clash with those objectives.

The *Michelin* Court then observed that, consistent with its limited objectives, the Import-Export Clause was phrased in terms of a prohibition of only state "imposts" and "duties," and "just as clearly, the Clause is *not* written in terms of a broad prohibition of every '*tax.*'" *Id.* at 290 (emphasis added). Relying on historical sources, the Court found the omission from the Import-Export Clause of the term "tax" to be important and to signify that the clause should apply only to revenue measures that were targeted at goods produced abroad. *Id.* at 287, 291-93. Thus, the Court held that the Import-Export Clause did not prohibit uniform state taxes on imported goods no longer in transit, so long as such taxes applied without regard to the foreign origin of the goods; such nondiscriminatory state taxes were not "imposts or duties" within the meaning of the Import-Export Clause.

This line of reasoning was extended to state taxation of *exports* in *Washington Stevedoring*. That case involved Washington's business and occupation tax as applied to stevedoring activities conducted within the state. The Court reviewed the limited purposes of the Import-Export Clause that had been identified in *Michelin* and found here too that the state tax did

not offend those objectives. As the tax did not discriminate between export and domestic commerce and applied only to services conducted within the state, the tax caused neither disharmony among the States nor disruption of federal foreign affairs. Moreover, a state tax impacting exports would not interfere with federal tax revenues because the federal government was itself precluded by the Export Clause from taxing exports.[10] The Court then reiterated the "central holding" of *Michelin*: that the Import-Export Clause by its terms was a prohibition "only of 'Imposts or Duties' and not of all taxes." 435 U.S. at 759. A non-discriminatory state levy on services performed within the taxing state was thus held not to be an impost or duty within the meaning of the Import-Export Clause. *Id.* at 761.

Plainly, *Michelin* and *Washington Stevedoring* cannot be read as supporting the Government's proposed reinterpretation of the Export Clause. Both rulings were based on a textual examination of the Import-Export Clause (dealing with imposts and duties but "not written in terms of a broad prohibition of every 'tax'"; *Michelin*, 423 U.S. at 290) and on the limited purposes which the Framers intended that clause to serve. Both decisions stressed the omission of the word "tax" from the Import-Export Clause prohibition and both contrasted that language with the Article I, § 8, cl. 1 grant to Congress of the "Power To lay and collect *Taxes*, Duties, Imposts and Excises." *Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759 (emphasis added). The language of the Export Clause similarly contrasts with the Import-Export Clause, for the Export Clause provides: "*No Tax* or Duty shall be laid on Articles exported from any State." Art. I,

[10] The Import-Export Clause as applied to exports "does not serve to protect federal revenues . . ., *because the Constitution forbids federal taxation of exports*. U.S. Const., Art. I, § 9, cl. 5; see *United States* v. *Hvoslef*, 237 U.S. 1 (1915)." 435 U.S. at 758 (emphasis added).

§ 9, cl. 5 (emphasis added). The absence of a prohibition on "taxes" in the Import-Export Clause was central to the *Michelin* and *Washington Stevedoring* holdings, and belies the notion that those decisions are guidance to interpreting the Export Clause, which explicitly *does* prohibit any federal "*tax*."

But the defect in the Government's position is far deeper than linguistic. *Michelin* and *Washington Stevedoring* concluded that the objectives of the Import-Export Clause were to ensure that the states not intrude on specified federal prerogatives (foreign affairs and import revenues) and that border states not exploit their geographic position against inland states. *Michelin*, 423 U.S. at 285-86; *Washington Stevedoring*, 435 U.S. at 752-53. Quite obviously, these were not the objectives of the Export Clause, which imposes restrictions on the *federal* government (not the States) and in no way deals with the relations *between* the States. The Export Clause has always been understood as imposing a broad and unqualified prohibition of federal taxation of exports and as not limited simply to the prevention of discrimination. *E.g.*, *Fairbank* v. *United States*, 181 U.S. 283 (1901).[11] The Framers intended that exports "not be

[11] *Fairbank* explicitly rejected the Government's argument that the Export Clause prohibits "mere discrimination." 181 U.S. at 292:

> "This argument [by the Government] does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article

(continued...)

made a source of revenue to the National Government" and, indeed, that the federal government "should put nothing in the way of burden upon such exports." *Id.* at 292-93. This exemption from taxation "was one of the compromises which entered into and made possible the adoption of the Constitution." *Id.* at 290. The clause prohibits all federal taxation of exports, not just taxes that were "discriminatory" or directed at exports as such. Exports were to have a "liberal protection" from federal taxation (*A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 70 (1923)), and the Court's more narrow interpretation of the Import-Export Clause simply does not carry over.[12]

The fallacy in the Government's position is illustrated most strikingly by one passage in *Washington Stevedoring* where this Court relied on the prohibition of federal taxes in the Export Clause to conclude that the States enjoyed greater taxing freedom under the Import-Export Clause. The Court noted that one objective of the Import-Export Clause was to

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[11](...continued)
of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden."

[12] At the Constitutional Convention, both supporters and critics of the Export Clause recognized its broad and unqualified scope. *See* 2 *The Records of the Federal Convention of 1787* 220 (Max Farrand ed., revised ed. 1937) ("[T]he hands of the Legislature were absolutely tied. . . . exports could not be taxed.") (remarks of Mr. King); *id.* at 361 ("It is best to prohibit the National Legislature in all cases.") (remarks of Mr. Sherman); *id.* at 362 (Col. Mason stating his opposition to "subjecting [the states'] exports as well as imports to a power of general taxation"). *See also* the decision of the court of appeals below at App. 10a ("While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbid[ding] federal taxation of exports.'") (citations omitted).

ensure that the States did not impair federal taxation of imports, which were expected to be a major source of revenue for the national government. *See Michelin*, 423 U.S. at 285. In addressing the relevance of this objective in the export context, the Court in *Washington Stevedoring* observed that giving the States greater taxing leeway would not impair federal revenues because *the federal government itself could not tax exports*. 435 U.S. at 758, citing the Export Clause and *United States* v. *Hvoslef*.[13] It utterly defies logic for the Government now to argue that *Washington Stevedoring* supports new, broader taxing authority for the federal government, when the Court's holding that the States could tax exports relied directly on the proposition that the federal government could not.

Finally, the Government stresses that for many years this Court read the Export Clause and the Import-Export Clause in parallel. (Pet. 15-16) While that was once true,[14] that approach was necessarily abandoned in *Michelin* and *Washington Stevedoring*. There, in reaching a new and narrower interpretation of the Import-Export Clause, the Court placed clear and decisive weight on that clause's specific objectives and its application only to "imposts and duties" and not more broadly to "taxes." See pages 7-9 *supra*. The Export Clause, by contrast, serves different purposes and does say "No Tax." Given the different language and objectives of the two clauses, the Government's proposed reinterpretation of the Export Clause to fit the new Import-Export Clause mold is not viable. The lower courts were thus correct to adhere to *Thames & Mersey*, *Fairbank*, and *Hvoslef*, and to

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[13] See note 10 *supra*.

[14] *E.g.*, *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827) ("[t]here is some diversity in language, but none is perceived in the act which is prohibited").

hold the § 4371 tax to be unconstitutional as applied.[15]

2. *Under the Claims Court's Alternative Holding, the Tax Here Is Still Invalid as Applied, Even if the Import-Export Clause Analysis Were Relevant.*

For the reasons just discussed, the Export Clause analysis should be unaffected by recent decisions under the Import-Export Clause. But even if that were not so, the result in this case is unchanged. As the Claims Court ruled in its alternative holding, *Thames & Mersey* and the present case are readily distinguishable from *Michelin* and *Washington Stevedoring*. *Michelin* involved a state tax on imported goods that were no longer in transit (423 U.S. at 302), and the stevedoring levy in *Washington Stevedoring* involved a tax "upon a service distinct from the goods *and their value*." 435 U.S. at 757 (emphasis added). On this point in *Washington Stevedoring*, the Court noted *Thames & Mersey* and observed: "In distinguishing that case from the taxation of stevedoring activities . . ., one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* at 756 n.21.

The § 4371 tax in question here, like the tax in *Thames*

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[15] The Government's reliance on Commerce Clause cases as justifying federal taxation of exports is also inappropriate. The fact that the Commerce Clause has played only a limited role in restricting state taxes (Pet. 24-25) is hardly instructive on how one should interpret the express preclusion in the Export Clause of federal taxes on exports. *See, e.g.*, Pet. 21 n.8 ("These decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause."). Similarly, while the Commerce Clause authorizes federal *regulation* of export commerce, that authorization is still subject to the Export Clause's prohibition of *taxation* of exports. *E.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 79 (1908). Here, the Government has conceded that § 4371 is a "tax" and not a regulation. See pp. 3-4 *supra*.

& Mersey, applies to the goods while in transit and bears a direct relation to the value of the goods. The tax is a percentage of the premium paid, and the premium in turn varies with the declared value of the shipment. (App. 39a) Thus, as the lower court held:

> "In the present case, the casualty insurance policies were at all times within the export stream and were significantly related to the exportation process. Whether the § 4371 tax would be impermissible even without the support of *Thames & Mersey* is, we realize, not stated dispositively by the Court [in *Washington Stevedoring*], but there is nothing in *Washington Stevedoring* that indicates that *Thames & Mersey* and the connection drawn in that case between insurance policies and the value of goods have been banished into irrelevance." (App. 29a)

On this alternative ground, then, the § 4371 tax as applied to IBM's exports is still invalid under the Export Clause, even assuming that *Michelin* and *Washington Stevedoring* are relevant precedents for the Export Clause. This Court "reviews judgments, not statements in opinions" (*Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)), and this is an additional reason why certiorari is not warranted here.

3. *There Is Neither a Significant Revenue Measure Nor a Principle of Broad Application Presented in this Case.*

The lower courts did not strike down § 4371 in its entirety but only as applied to the export shipments involved in this case. Even for a very large exporter such as IBM, the amount of revenue at stake is modest. See page 1 n.1 *supra*. Moreover, the United States has been increasingly willing to waive enforcement of § 4371 in bilateral tax treaties in order

to avoid double taxation of foreign insurance carriers.[16] This is because one of the original purposes of § 4371 — to eliminate unfairness to insurance carriers subject to U.S. income tax — has become increasingly obsolete as foreign governments have themselves taxed their resident insurers. Where this occurs, § 4371 imposes *double* taxation rather than eliminating a tax imbalance.[17]

The Government also references some 700 pending cases in the Court of International Trade that challenge the constitutionality of the federal Harbor Maintenance Fee, 26 U.S.C. §§ 4461-4462. (See Pet. 13-14) However, whether the Export Clause is applicable in those cases is in dispute. The Government's position in the Court of International Trade is that "the harbor maintenance fee is a user fee based upon Congress's plenary authority to regulate commerce, *not a tax subject to the export clause*,"[18] and that "consequently the analysis employed in *Thames & Mersey* and [by the Federal

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[16] *See, e.g.*, Convention for the Avoidance of Double Taxation, Aug. 31, 1994, U.S.-France, art. 2(1)(a)(ii), ratified, 141 Cong. Rec. S12523 (daily ed. Aug. 11, 1995); Convention for the Avoidance of Double Taxation, Aug. 29, 1989, U.S.-Germany, art. 2(1)(a)(bb); Third Protocol Further Amending the Convention for the Avoidance of Double Taxation, Mar. 15, 1979, U.S.-U.K., art. II, 31 U.S.T. 5709, 5710, T.I.A.S. 9682; 1 J. Ross Macdonald, *Annotated Topical Guide to U.S. Income Tax Treaties* 432 (1990-2 Supp.).

[17] *See, e.g.*, S. Exec. Rep. No. 7, 104th Cong., 1st Sess. 3, 30-31 (1995) (explaining the § 4371 waiver contained in the new U.S.-France treaty against double taxation).

[18] Memorandum of the United States in Support of its Motion for Summary Judgment, *United States Shoe Corp.* v. *United States*, pp. 27-39 (Ct. Int'l Trade No. 94-11-00668) (Apr. 14, 1995) (emphasis added). Here, the Government can make no such argument. See note 3 *supra*.

Circuit] in *IBM* is simply inapplicable to this case."[19] That position was recently rejected by the CIT[20] but presumably will be renewed by the Government before the Federal Circuit. At the very least, it is too early to know what significance the Export Clause and *Thames & Mersey* will ultimately have on the harbor maintenance fee litigation. If the Export Clause does prove important, the Government will have ample opportunity in the context of that litigation to urge this Court to adopt its new, proposed construction of the Export Clause. A grant of the petition in this case is neither necessary nor appropriate for that purpose.

CONCLUSION

The petition of a writ of certiorari should be denied.

Respectfully submitted,

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[19] Proposed Defendant's Supplemental Memorandum, *United States Shoe Corp.* v. *United States*, *supra*, p. 4 (Aug. 9, 1995).

[20] *United States Shoe Corp.* v. *United States*, Slip Op. 95-173 (Ct. Int'l Trade Oct. 25, 1995) (granting summary judgment for plaintiff and ruling that the harbor maintanence fee violates the Export Clause).

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No. 95-591

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent errs in contending that the question presented lacks substantial continuing importance. The Federal Circuit held a federal tax to be unconstitutional in this case. That decision, if valid, would require the return of millions of dollars of federal revenues that have been collected from a large number of affected taxpayers. It would also directly undermine the congressional policy of placing foreign and domestic insurers on a more equal competitive footing. See Pet. 14-15. Review by this Court of the Federal Circuit's exercise of the Judiciary's most "grave power of annulling an Act of Congress" is

fully warranted. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

Respondent mistakenly contends that the decision below implicates "no broad principle applicable to other revenue measures" (Br. in Opp. 6). Only four weeks ago, citing and relying on the decision entered in this case, the United States Court of International Trade held the federal "tax on any port use" (26 U.S.C. 4461(a)) to be unconstitutional as applied to transactions involving goods for export. *United States Shoe Corp.* v. *United States*, Slip op. 95-173, at 23 (Oct. 25, 1995). That decision, which involves more than $500,000,000 in revenues that have already been collected from the plaintiffs (*id.* at 8), is appealable only to the Federal Circuit.[1] See Pet. 13-14.

Since all taxpayers are entitled to pay a challenged tax and sue for a refund within the Federal Circuit, it is unlikely that other courts of appeals will have an opportunity to review the constitutional question presented in this case. This Court has long noted that plenary review is appropriate for decisions of the Federal Circuit that present issues of such substantial and recurring importance. See, *e.g.*, *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); Pet. 14.

[1] As respondent notes (Br. in Opp. 14-15), the *United States Shoe Corp.* case presents the additional question whether the "tax on port use" is a fee for services, rather than a "tax." That question is relevant, however, only if a generally applicable federal tax that applies without discrimination to both domestic and international transactions would violate the Export Clause. In determining that such a generally applicable tax would violate the Export Clause, the Court of International Trade cited as authoritative, and applied the reasoning of, the decision of the Federal Circuit in this case. *United States Shoe Corp.* v. *United States*, slip op. 95-173, at 17-24.

Moreover, as the court of appeals emphasized (Pet. App. 11a), only this Court has "the prerogative of overruling its own decisions." *Rodrigues de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Only this Court can determine whether the considerations that led it to uphold generally applicable, nondiscriminatory state taxes under the Import-Export Clause—and to overrule numerous inconsistent decisions in the process—apply equally to challenges to federal taxes under the Export Clause. In the absence of further review in this case, the Federal Circuit will be compelled to follow *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), even though, as the petition explains in detail (Pet. 15-30), the reasoning of that early decision has been repudiated by subsequent decisions of this Court.

2. a. Respondent contends that textual distinctions between the language of the Import-Export Clause and the Export Clause require that significantly different analyses be applied to constitutional challenges under those Clauses (Br. in Opp. 7-12). In particular, respondent suggests that an "impost or duty" under the Import-Export Clause is something different from—and narrower than—a "tax or duty" under the Export Clause (*id.* at 8-9).

In making that contention, respondent ignores the balance of the text of these Clauses. The Import-Export Clause precludes States from imposing "Imposts or Duties on Imports or Exports"; the Export Clause specifies that no federal "Tax or Duty shall be laid on Articles Exported." U.S. Const. Art. I, § 10, Cl. 2; Art. I, § 9, Cl. 5. A "tax" that is "laid on" an

"article exported" *is* an "impost" on an "export." An "impost" on an "export" *is* a "tax" that is "laid on" an "article exported." These constitutional phrases have an identical meaning, as this Court has consistently held. Giving effect to the *entire* text of both Clauses, the Court stated as long ago as *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827), that "[t]here is some diversity in language, but none is perceived in the act which is prohibited."

b. Respondent also errs in contending that the slight difference in phrasing of these two Clauses was "central to the *Michelin* and *Washington Stevedoring* holdings" (Br. in Opp. 9). In *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), the Court first explained the origin of the "original package" doctrine in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872), and that *Low*'s reliance on *Brown* v. *Maryland* for that doctrine was misplaced. 423 U.S. at 281-283. See Pet. 16-18, 22-24. The Court then concluded, based upon a historical analysis of the origins and purposes of the Import-Export Clause, that "a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an 'impost' or 'duty.'" 423 U.S. at 283. The Court explained that the history of the Import-Export Clause revealed that it was not designed to bring into question the constitutionality of a generally applicable state tax that applies to imported and domestic goods without discrimination. *Id.* at 286-290. See Pet. 23-24. The Court concluded that, consistent with its limited purpose, the Clause must be understood to permit general exactions that do not apply exclusively, or discriminatorily, to import or export transactions (423 U.S. at 293-294):

> [S]ince prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the Clause— "Imposts or Duties"—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.

In *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), the Court again relied on the purposes of the Import-Export Clause—and not on the long-rejected contention that its text varies in substance from the Export Clause—in concluding that a nondiscriminatory, generally applicable state tax is not unconstitutional as applied to transactions involving imports or exports. The Court noted that the challenged tax "violates none of the constitutional policies identified in *Michelin*" and concluded that "[i]t is, *therefore*, not among the 'Imposts or Duties' within the prohibition of the Import-Export Clause." *Id.* at 761 (emphasis added). That holding makes clear that the decisions in *Michelin* and *Washington Stevedoring* were based upon the "constitutional policies identified in *Michelin*" (*ibid.*) and were not premised upon the inconsequential "diversity in language" of the two Clauses (*Brown* v. *Maryland*, 25 U.S. (12 Wheat.) at 445).

3. The reasoning of the Court in *Michelin* and *Washington Stevedoring* applies equally to nondiscriminatory federal taxes under the Export Clause. Those decisions demonstrate that, when a generally

applicable, nondiscriminatory tax is at issue, the mere fact that the tax applies also to goods that are in the export or import process does not provide a constitutitional immunity from taxation. See Pet. 27-30.

As the court of appeals acknowledged in this case (Pet. App. 4a), and as *Madison's Notes of Debates* and Warren's *Making of the Constitution* demonstrate, the Export Clause resulted from one of the sectional divisions that marked the Constitutional Convention (Pet. 28-29). In particular, it stemmed from the "concern that a Congress controlled by the more numerous and populous Northern States would impose burdensome levies on Southern exports" (Pet. App. 4a), including the "three great crops which grew nowhere else—tobacco, rice, and indigo" (Pet. 28 n.10). This narrow historical purpose of the Export Clause is complemented by the narrow language employed in the Clause, which proscribes only federal taxes "laid on" an "article exported."

There is obviously no basis for respondent to contend that the generally applicable tax on insurance imposed by Section 4371 of the Internal Revenue Code conflicts with the policies that the Export Clause embodies. This federal tax applies to many forms of insurance that have no relation whatever to exports or the export process (such as life insurance, sickness and accident policies, indemnity bonds and annuity contracts). See 26 U.S.C. 4371(1), (2). Even as applied to casualty insurance, the tax obviously has only an incidental and remote relationship to exports and the export process—and it applies equally to

wholly domestic commerce as well.[2] That the statute does not discriminate against exports is clear from its text, for it applies to insurance for any risk that arises either "wholly or partly within the United States" (26 U.S.C. 4372(d)(1), (2)).

In view of the limited purpose and narrow language of the Export Clause, there is no adequate rationale for sifting through all possible applications of a generally applicable, nondiscriminatory federal tax to proscribe its application in remote contexts involving exported goods. Consider, for example, a hypothetical transaction that is not unrelated to the facts of this case. A ship sets out from California with a cargo produced in Arizona. Part of the cargo will be offloaded in British Columbia to a buyer doing business there. The remainder of the cargo will be delivered to a buyer in Alaska. The cargo has been insured by a foreign insurer against damage or loss for its entire journey—beginning with its loading on trucks in Arizona and until delivery at the places of business of the buyers in British Columbia and Alaska. The nondiscrimination policies embodied in the Export Clause plainly do not require that the insurance covering the part of the cargo delivered in British Columbia be made exempt from the federal tax on insurance while the Alaska portion of the cargo is not. That would turn the constitutional shield against discrimination in the Export Clause into a sword requiring discrimination. As this Court noted in *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904), the

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[2] Even within the specific category of casualty insurance, the statute applies to risks that have little or no connection with exports and exportation—such as fire, flood and earthquake.

Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." See Pet. 19-20.

A federal tax on insurance for risks that occur "wholly or partly within the United States"—and that applies without discrimination to both domestic and international commerce—is not a tax "laid on" an "article exported" within the meaning of the Export Clause. The contrary conclusion of the Federal Circuit in this case, and that court's annulment of an Act of Congress, warrants review by this Court.

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1995

Supreme Court, U.S.
FILED
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No. 95-591

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). The question presented in this case is:

Whether, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad, the tax imposed by Section 4371 of the Internal Revenue Code violates the Export Clause of the Constitution of the United States (U.S. Const. Art. I, § 9, Cl. 5).

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No. 95-591

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 59 F.3d 1234. The opinion of the Court of Federal Claims (Pet. App. 12a-30a) is reported at 31 Fed. Cl. 500.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on July 10, 1995. The petition for a writ of certiorari was filed on October 10, 1995 (a Tuesday following a Monday holiday), and was granted on December 8, 1995. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States provides, in relevant part:

a. Art. I, § 8, Cl. 3:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

b. Art. I, § 9, Cl. 5:

> No Tax or Duty shall be laid on Articles exported from any State.

c. Art. I, § 10, Cl. 2:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws * * *.

2. The Internal Revenue Code provides, in relevant part:

a. 26 U.S.C. 4371:

> There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer, a tax at the following rates:
>
> (1) 4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);
>
> (2) 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of life, sickness, or accident insurance, or annuity contract, unless the insurer is subject to tax under section 819, and
>
> (3) 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of reinsurance covering any of the contracts taxable under paragraph (1) or (2).

b. 26 U.S.C. 4372:

> (a) For purposes of section 4371, the term "foreign insurer or reinsurer" means an insurer or reinsurer who is a nonresident alien individual, or a foreign partnership, or a foreign corporation. * * *
>
> (b) For purposes of section 4371(1), the term "policy of casualty insurance" means any policy (other than life) or other instrument by whatever name called, whereby a contract of insurance is made, continued, or renewed.
>
> * * * * *
>
> (d) For purposes of section 4371(1), the term "insured" means—(1) a domestic

corporation or partnership, or an individual resident of the United States, against, or with respect to, hazards, risks, losses, or liabilities wholly or partly within the United States, * * *.

* * * * *

c. 26 U.S.C. 4373 (1982):[1]

The tax imposed by section 4371 shall not apply to—

(1) any policy, indemnity bond, or annuity contract signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business; * * *

* * * * *

d. 26 U.S.C. 4374:

The tax imposed by this chapter shall be paid, on the basis of a return, by any person who makes, signs, issues, or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued or sold. * * *

---

[1] This provision was amended in 1988 to conform to terminology elsewhere employed by Congress to describe activities that are "effectively connected" to activities within the United States and are therefore subject to the federal income tax. See 26 U.S.C. 864(c), 882(a)(1). The amendment does not alter the application of the statute in the context of this case.

STATEMENT

1. Respondent International Business Machines Corporation brought this suit in the Court of Federal Claims to obtain a refund of $1.5 million in taxes assessed under Section 4371 of the Internal Revenue Code. IBM does not dispute that the taxes were correctly assessed under the statute. Instead, IBM contends that the statute is unconstitutional as applied to the facts of this case.

a. Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)).[2] The tax is to be paid by "any person * * * for whose use or benefit" the policy is "made, signed, issued, or sold." 26 U.S.C. 4374.

Section 4371 was enacted in 1942 to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942). The tax therefore does not apply if the policy issued by the foreign insurer is "signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business." 26 U.S.C. 4373(1) (1982). See also note 1, *supra*; 26 C.F.R. 46.4371-2(a).

b. IBM manufactures a variety of business products that it sells throughout the world. During the

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[2] The term "foreign insurer" is defined to mean an insurer "who is a nonresident alien individual, or a foreign partnership, or a foreign corporation" (26 U.S.C. 4372(a)).

period involved in this case, IBM shipped products for international sales from its manufacturing facilities or warehouses in Arizona, California, Colorado, Florida, Minnesota, New York, North Carolina, Texas, and Virginia (Pet. App. 13a-14a). IBM made its international sales through a network of more than one hundred wholly owned subsidiaries (Pet. App. 14a-15a):

> Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders. * * *

Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were destined for a United States airport (typically John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the Far East), but some shipments were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for two to five days, but could remain * * * as long as thirty days. The products would be reloaded at the freight for-

> warders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, they were unloaded, cleared customs, and loaded on trucks for shipment to their final destination.

The terms of sale specified that title to the goods, and risk of loss, passed from IBM to its foreign subsidiary only when the goods cleared customs in the foreign country. The foreign subsidiaries were nonetheless required to bear the cost of insuring the products against damage or loss during the entire shipment (Pet. App. 15a).

The insurance obtained for these shipments was "point to point": it covered the risk of damage or loss during transportation of the goods from the IBM facility in the United States to the point of foreign delivery. When IBM made the arrangements, the insurance was placed with a domestic insurer and the cost was billed to the foreign subsidiary. When the foreign subsidiary made the arrangements, the insurance was often placed with a foreign carrier, which the subsidiary paid directly. In both situations, IBM and its foreign subsidiary were listed as joint beneficiaries on the policies of insurance (Pet. App. 15a-16a).

If damage or loss occurred before the goods cleared customs —while IBM retained title to the goods and risk of loss—IBM received the insurance proceeds directly under these policies. If the loss occurred *after* the goods cleared customs—when title and risk of loss had passed to the importing foreign subsidiary —the insurance proceeds were paid to the subsidiary. In the latter event, the proceeds were used by the -

subsidiary to pay the full purchase price of the damaged or lost goods to IBM or, if IBM had already been paid, to reimburse the subsidiary for its loss (Pet. App. 16a).

c. IBM filed federal excise tax returns for 1975 through 1984 but did not report any liability under Section 4371 of the Internal Revenue Code. On audit, the Internal Revenue Service determined that the premiums paid to foreign insurers were subject to the tax imposed by Section 4371 and that, pursuant to Section 4374, IBM was liable for the tax as a named beneficiary of the insurance policies.

The foreign subsidiaries reported to IBM that, during 1980, they had paid premiums of $2,065,137 to foreign insurers for "point to point" insurance covering shipments of products that IBM had manufactured in the United States. The tax applicable to those premiums under Section 4371(1) of the Code—calculated by multiplying the premiums by four percent—is $82,605. The parties stipulated that the foreign insurance premiums attributable to shipments of IBM products in each of the years 1975-1979 and 1981-1984 were the same as in 1980. The IRS therefore assessed the same amount of tax for each of those years under Section 4371 (Pet. App. 18a).

2. IBM paid the resulting assessments and filed claims for refund. When those claims were denied, IBM commenced this refund suit in the Court of Federal Claims. The relevant facts were stipulated by the parties (Pet. App. 34a-41a).

a. IBM contended that the tax imposed by Section 4371 of the Internal Revenue Code—as applied to insurance premiums on policies covering the shipment of goods from locations within the United States to purchasers abroad—violates the Export

Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. IBM contended that the tax on insurance for export shipments is a "Tax or Duty * * * laid on Articles exported" and is invalid under the specific holding of this Court in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915). In *Thames & Mersey*, the Court held a federal stamp tax on policies insuring marine risks unconstitutional as applied to policies covering shipments for export.

The United States contended that the analysis of *Thames & Mersey* is no longer valid. The government reasoned that subsequent decisions of this Court, such as *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1978), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), require the conclusion that the Export Clause does not invalidate a generally applicable, nondiscriminatory tax that does not fall specifically on articles of export or export transactions.

b. The Court of Federal Claims held that application of the tax imposed by Section 4371 to insurance premiums for goods in export transit violates the Export Clause because it "amounts to a tax on exports" (Pet. App. 26a). The court reasoned that this conclusion follows from the precise holding of this Court's 1915 decision in *Thames & Mersey*, which stated (237 U.S. at 26):

> It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation.

The Court of Federal Claims emphasized that, under *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), lower courts "must adhere to the accepted practice of following Supreme Court precedent unless the Supreme Court clearly states that it is overruling earlier cases and explains why it is doing so" (Pet. App. 28a). The court found no clear evidence that *Thames & Mersey* had been overruled or that its analysis has been discarded by this Court. The court held that *Thames & Mersey* therefore remains authoritative and that it compels the conclusion that the tax imposed by Section 4371 is unconstitutional as applied in this case (Pet. App. 29a).

The court acknowledged that this Court's more recent decisions under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* have upheld application of nondiscriminatory state taxes to goods and services involved in importation and exportation. The court concluded, however, that those decisions could be distinguished on their facts. The court explained that *Washington Stevedoring*—which upheld application of a state gross receipts tax to a stevedoring company that handled export and import shipments—concerned "stevedoring" rather than "insurance" and that "stevedoring is a service whose value is not necessarily tied to the value of the goods it serves" (Pet. App. 29a). The court further stated that *Michelin Tire*—which upheld application of a state property tax to imported goods located within the borders of the State—is inapposite because "in *Michelin* the [imported goods] had left the import stream and were * * * thus outside the scope of the Import-Export Clause" (Pet. App. 29a).

3. The court of appeals affirmed (Pet. App. 1a-11a). The court noted (*id.* at 11a) that this Court has admonished the lower courts that (*Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. at 484)

> [i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

The court of appeals stated that it was therefore bound to follow *Thames & Mersey*, and hold the tax imposed by Section 4371 unconstitutional as applied in this case, unless subsequent decisions of this Court "clearly signaled" an intent to overrule that earlier decision (Pet. App. 8a).

The court of appeals concluded that it was "not so sure" (Pet. App. 8a) that *Washington Stevedoring* and *Michelin Tire* signaled the requisite clear intent of this Court to abandon the analysis of *Thames & Mersey*. The court of appeals did not dispute that, if an analysis "similar" to that applied under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* were applied under the Export Clause, the holding and reasoning of *Thames & Mersey* would be discredited (Pet. App. 7a-8a). Instead, the court stated that it was not certain that a similar analysis would be applied because there is a difference in the language of the two Clauses that could require a different result: the Import-Export Clause bars States from laying "Imposts or Duties on Imports or Exports"; the Export Clause bars the United States from laying any "Tax or Duty * * *

on Articles exported from any State." The court of appeals stated (*id.* at 9a-10a):

> Although the [Supreme] Court at first expressed the view that the "diversity in language" between the two clauses did not reflect any difference in "the act which is prohibited," *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827), in both *Michelin* and *Washington Stevedoring* the Court has noted and attached significance to the difference between the narrow term "Imposts and Duties" * * * and the broader term "Tax" * * * . *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759.

Reasoning that a "tax" that might be permitted under the "narrow" language of the Import-Export Clause might nonetheless be invalid under the "broader" language of the Export Clause (Pet. App. 10a), the court concluded that the recent Import-Export Clause decisions fail to provide the requisite clear guidance that would permit a lower court to "disregard[] a higher court decision that all agree is binding precedent if it is still valid" (*id.* at 10a-11a).[3] The court therefore held "that [its] duty is to follow *Thames & Mersey* and hold Section 4371 invalid as applied" (*id.* at 11a).

SUMMARY OF ARGUMENT

The federal tax on insurance premiums paid to a foreign insurer for risks that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)) is a nondiscriminatory tax of general application. It does

[3] The court of appeals noted that the United States had conceded that, "if *Thames & Mersey* is still good law, the assessments at issue in this case are invalid" (Pet. App. 6a).

not apply specifically to export transactions; to the contrary, it applies only to insurance risks that are either "wholly" or "partly" domestic. The tax was enacted to diminish the competitive advantage that existed for foreign insurers who were otherwise not subject to the federal income tax.

The court of appeals erred in concluding that application of this tax to casualty insurance for shipments from within the United States to foreign countries violates the Export Clause of the Constitution. In particular, the court erred in relying on this Court's 1915 decision in *Thames & Mersey Marine Ins. Co.* v. *United States* for this conclusion. This Court's more recent decisions have repudiated the reasoning of *Thames & Mersey*. Under the analysis of these modern decisions, the tax imposed by Section 4371 does not violate the Export Clause because it is a generally applicable, nondiscriminatory tax that does not fall specifically on articles of export or export transactions. As this Court stated in upholding a similarly nondiscriminatory federal tax against an Export Clause challenge in *Peck & Co.* v. *Lowe*, 247 U.S. 165, 175 (1918): "There is no discrimination. At most, exportation is affected only indirectly and remotely."

As this Court has noted, the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904). The history of the Export Clause reflects that it was designed to protect the exports of individual States from repressive discrimination by other States acting through their representatives in the National government. That nondiscrimination policy does not require that exports be relieved "from

uniform taxes" applicable to all commerce generally or that Congress give "preferential treatment" to exports by exempting them from generally applicable taxes (*Michelin Tire Corp.* v. *Wages*, 423 U.S. at 293-294). The nondiscriminatory, generally applicable tax imposed by Section 4371 is therefore constitutional and should be upheld.

ARGUMENT

SECTION 4371 OF THE INTERNAL REVENUE CODE IMPOSES A GENERALLY APPLICABLE, NONDISCRIMINATORY TAX THAT DOES NOT FALL SPECIFICALLY UPON ARTICLES OF EXPORT OR EXPORT TRANSACTIONS AND DOES NOT VIOLATE THE EXPORT CLAUSE OF THE CONSTITUTION

The court of appeals concluded that the federal tax on insurance premiums paid to a foreign insurer for risks that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1))—as applied to casualty insurance for shipments from the United States to foreign countries—represents a "Tax or Duty * * * laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5) and therefore violates the Export Clause of the Constitution. The court stated that it was compelled to follow this Court's 1915 decision in *Thames & Mersey Marine Ins. Co.* v. *United States* in reaching that conclusion.

This Court's more recent decisions, however, have repudiated the reasoning of *Thames & Mersey*. Under the analysis of these modern decisions, the tax imposed by Section 4371 does not violate the Export Clause because it is a generally applicable, nondiscriminatory tax that does not fall specifically on articles of export or export transactions.[4]

1. *The Tax Imposed By Section 4371 Is A Generally Applicable, Nondiscriminatory Tax.* The tax imposed by Section 4371 of the Internal Revenue Code is not specifically directed to nor directly "laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5). Instead, it applies to insurance premiums paid to foreign insurers for many forms of insurance, including any casualty risk that is "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). It thus applies without discrimination to "wholly" domestic transactions as well as to risks that are only "partly" within the United States. As the House Ways and Means Committee observed when the statute was first enacted in 1942, Section 4371 is

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[4] The proper scope of the Export Clause has significance not only for the tax imposed under Section 4371 but also for other nondiscriminatory federal taxes of general application. For example, Section 4461 of the Internal Revenue Code imposes on all shippers a "tax on any port use" of 0.125 percent of the value of all commercial cargo loaded or unloaded in United States ports. See 26 U.S.C. 4461(a), (b) (Supp. V 1993), 4462(a)(1). In cases brought by over 700 shippers involving more than $500,000,000 in revenues that have already been collected, the United States Court of International Trade recently held Section 4461 to be unconstitutional as applied to transactions involving goods for export. *United States Shoe Corp.* v. *United States*, Slip op. 95-173, at 8, 23 (Oct. 25, 1995). In determining that such a generally applicable, nondiscriminatory tax would violate the Export Clause, the Court of International Trade cited as authoritative, and applied the reasoning of, the decision of the Federal Circuit in this case (*id.* at 17-24). The Federal Circuit has exclusive jurisdiction over appeals from decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5).

designed to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, *supra*, at 61.

It is unquestioned that the tax imposed under Section 4371 could and would be applied to a policy of casualty insurance issued by a foreign insurer covering risks that are "wholly" within the United States—for example, insurance for the transit of goods from Minnesota to Hawaii. As long ago as *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1869), it was established that goods moving from one State to another are not "exports" from the shipping State or "imports" in the receiving State within the meaning of the Constitution. The question addressed in this case is thus limited to whether the tax imposed by Section 4371 on premiums for casualty insurance for shipments "partly" outside of the United States is unconstitutional even though application of that tax to shipments "wholly" within the United States is unquestionably valid.

2. *The Export And Import-Export Clauses Are Complementary In Scope.* The proper resolution of this narrow question requires consideration of the text and history of, and the rulings of this Court under, both the Export Clause and the Import-Export Clause. The court of appeals suggested, however, that the language of the Export Clause may be "broader" in its prohibitive scope than the language of the Import-Export Clause (Pet. App. 10a) and that decisions under the latter Clause therefore may not be relevant in interpretation of the former.

That suggestion, however, does not withstand analysis. The entire text of the two Clauses must be considered. The Import-Export Clause precludes

States from imposing "Imposts or Duties on Imports or Exports"; the Export Clause specifies that no federal "Tax or Duty shall be laid on Articles exported." U.S. Const. Art. I, § 10, Cl. 2; Art. I, § 9, Cl. 5. An "impost" or "duty" on an "export" *is* a "tax" on an "Article exported"; a "tax" on an "Article exported" *is* an "impost" or "duty."[5] Giving effect to the *entire* text of both Clauses, Chief Justice Marshall stated in this Court's first decision under either the Import-Export Clause or the Export Clause (*Brown* v. *Maryland*, 25 U.S. (12 Wheat.) at 445):

> The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited.

That observation has been repeated by this Court on numerous occasions.[6] In the more numerous cases under the Import-Export Clause and the less numerous cases under the Export Clause, the Court has routinely cited cases under the two Clauses without differentiation. Moreover, as we shall discuss, the analysis applied in opinions under the two Clauses has not varied.

3. *The "Original Package" Doctrine and Early Decisions Addressing Generally Applicable, Non-*

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[5] In *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827), Chief Justice Marshall explained that an "impost" is a "duty on imports" and represents "a tax levied on articles brought into a country * * *."

[6] See, *e.g.*, *Turpin* v. *Burgess*, 117 U.S. 504, 506-507 (1886); *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904); *United States* v. *Hvoslef*, 237 U.S. 1, 14 (1915); *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 67 n.5 (1974).

discriminatory Taxes Under the Import-Export Clause. In *Brown* v. *Maryland*, a Maryland statute required that importers or wholesalers of foreign goods purchase a license costing $50 before selling such goods. Brown was convicted of having imported and sold a package of foreign goods without having obtained the license. In holding that the statute violated the Import-Export Clause, the Court explained that a tax on the privilege of selling foreign goods was, in substance, a duty upon things imported for sale. 25 U.S. (12 Wheat.) at 439. Rejecting the suggestion that this would mean that imported goods would be permanently immune from taxation by the States, the Court stated that an import retained its "distinctive character" only while in the "original form or package in which it was imported" (*id.* at 442).

The statute involved in *Brown* v. *Maryland* discriminated against imported goods because it imposed no comparable licensing requirement for the sale of domestic goods. See 25 U.S. (12 Wheat.) at 436. In the *License Cases*, 46 U.S. (5 How.) 504 (1847), the Court upheld a similar licensing requirement that applied to the sales of *both* imported and domestic goods. Chief Justice Taney, who had argued the case of *Brown* v. *Maryland* for the State, did not question the validity of the "original package" doctrine and acknowledged that a tax directed uniquely at imports would be invalid. *Id.* at 574-575. He explained, however, that a generally applicable, nondiscriminatory state tax would not be unconstitutional merely because the tax also applies to imported goods (*id.* at 576):

> Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable accordingly to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State.

Twenty-five years after the *License Cases*, however, the Court reached a different conclusion in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872). In *Low*, the Court held that a nondiscriminatory, generally applicable California property tax could *not* be imposed upon a shipment of French champagne held in an importer's warehouse in the "original package" in which shipped. *Id.* at 35. In so ruling, the Court neglected to consider the contrary conclusion of Chief Justice Taney in the *License Cases*, although his approval of the "original package" doctrine was cited by the Court. *Id.* at 33-34.[7]

4. *The Early Export Clause Cases.* The Export Clause was invoked in *Pace* v. *Burgess*, 92 U.S. 372 (1876), by a tobacco manufacturer who, in 1868, was subject to a federal excise tax on tobacco products. Although tobacco intended for export was exempt from the tax, the exemption was subject to the

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[7] The "original package" rule was also followed in *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878), *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218 (1933), and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945). See also *May* v. *New Orleans*, 178 U.S. 496 (1900); *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959).

requirement that packages for export be identified by an engraved stamp costing 25 cents. The manufacturer brought suit to recover the price of the stamps, claiming that they constituted a prohibited tax on exports. The Court denied recovery, explaining that the stamps were designed to prevent fraud and did not represent a tax. *Id.* at 375.

In 1882, however, Congress discontinued the charge for the exemption stamp in a statute that referred to the stamp as an "export tax." Act of Aug. 8, 1882, ch. 468, 22 Stat. 372. On that basis, another tobacco manufacturer sued to recover the amounts he had paid for these stamps before the charge was discontinued. The Court adhered to its decision in *Pace* v. *Burgess*, but with a somewhat different rationale. In describing the Export and Import-Export Clauses, the Court stated (*Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886) (emphasis added)):

> The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. * * * But *a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of this intended exportation, is not within the constitutional prohibition.*

Quoting and relying upon the above passage, the Court subsequently held in *Cornell* v. *Coyne*, 192 U.S. 418, 427-428 (1904), that a manufacturer who produced filled cheese under a contract for export sale could not—merely because the cheese was designated for export—escape liability for the federal tax of one cent per pound on that product. The Court explained that the Export Clause "does not mean that articles

exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated" (*id.* at 427).

5. *The Decisions Leading to Thames & Mersey.* The direct predecessor of *Thames & Mersey* was *Fairbank* v. *United States*, 181 U.S. 283 (1901). That case involved a provision of the War Revenue Act of 1898 that imposed a variety of stamp taxes on written instruments, including "[b]ills of lading * * * for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place" (ch. 448, § 25 (Schedule A), 30 Stat. 459). In *Fairbank*, the Court held that this stamp tax on bills of lading, which applied *only* to exported goods, violated the Export Clause. Invoking a prior, similar holding under the Import-Export Clause (*Almy* v. *California*, 65 U.S. (24 How.) 169 (1861)), the Court held that the tax upon a bill of lading was invalid because it was equivalent to a tax upon the exported goods themselves.

Two later cases, argued on the same day, are the cases upon which respondent relies. Like *Fairbank*, they involved stamp taxes imposed by the War Revenue Act of 1898. Unlike *Fairbank*, however, neither tax was imposed expressly or uniquely on export transactions. *United States* v. *Hvoslef*, 237 U.S. 1 (1915), involved a federal stamp tax upon any "Contract or agreement for the charter of any ship" without reference to the intended destination of the ship or its cargo (30 Stat. 460). *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), upon which respondent most directly relies, involved a federal stamp tax on policies of marine insurance "whether covering peril by sea or on inland waters" (§ 25, 30 Stat. 461). Since these statutory provisions

did not differentiate between domestic voyages and shipments to foreign ports, it might have been supposed that they would be sustained as nondiscriminatory taxes of general applicability under the reasoning of the 1886 decision in *Turpin* v. *Burgess* and the 1904 decision in *Cornell* v. *Coyne*. See pages 20-21, *supra*.

In *Hvoself*, however, the Court invoked its decision in *Fairbank* without acknowledging that the stamp tax challenged in *Hvoslef*—unlike the tax challenged in *Fairbank* — was of general applicability and was not limited to voyages involving exports. In support of its conclusion in *Hvoslef* that a tax of general applicability would violate the Export Clause if it applied to export trade, the Court invoked *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887). *Robbins* was the first of "a long line of 'drummer' cases" in which the Court held, under the Commerce Clause, that a State could not impose a licensing fee on a person who solicited orders for goods to be shipped from another State.[8] The Court stated in *Robbins* (*id.* at 497):

[8] See *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 392 (1952). *Robbins* had a numerous progeny. See, *e.g.*, *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891); *DiSanto* v. *Pennsylvania*, 273 U.S. 34 (1927); *Nippert* v. *Richmond*, 327 U.S. 416 (1946). Among the more recent was *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which this Court overruled in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). In *Complete Auto Transit, Inc.*, the Court held, contrary to *Robbins* and *Spector*, that generally applicable state licensing statutes could be applied according to their terms, without granting exemption to those whose business was solely interstate. See 430 U.S. at 279-289; pages 29-30, *infra*.

These decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause. Although the Commerce Clause operates as a limitation on the powers of the States, it *confers* powers on the United States. See page 36, *supra*.

> It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate Commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

Having applied *Fairbank* and *Robbins* to exempt export transactions from broadly applicable, nondiscriminatory taxing provisions in *Hvoslef*, the Court entered its decision in *Thames & Mersey* two weeks later on the authority of *Hvoslef*. 237 U.S. at 27. In neither *Hvoslef* nor *Thames & Mersey* did the Court discuss the reasoning of prior decisions (such as *Cornell* v. *Coyne*, *supra*) that had upheld application of nondiscriminatory taxes that apply generally "to all property alike" and are not levied upon or because of the "exportation" or "intended exportation" of the goods (*Turpin* v. *Burgess*, 117 U.S. at 507).

The decisions in *Hvoslef* and *Thames & Mersey* established a pattern that this Court subsequently followed of immunizing export transactions from generally applicable federal taxes. For example, when Congress imposed a general tax on various sporting goods under the War Revenue Act of 1917, ch. 63, 40 Stat. 300, 317, the Court invoked not *Cornell* v. *Coyne* but *Hvoslef* and *Thames & Mersey* to hold that the Export Clause prohibited imposition of that tax upon a shipment of baseballs and bats to a purchaser in

Venezuela. *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923). See also *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292 (1917) (same under the Import-Export Clause). Similarly, in *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes*, 330 U.S. 422 (1947), the Court held that state sales or gross receipts taxes could not be imposed upon payments for loading and unloading ship cargoes transported in interstate or foreign commerce.

6. *The Modern Decisions Upholding Application of General, Nondiscriminatory Taxes to Export Transactions.*

a. Three years after the Court's decisions in *Hvoslef* and *Thames & Mersey*, the Court returned to an interpretation of the Export Clause that focussed on whether the challenged tax applied without discrimination to both domestic and foreign transactions. In *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918), the Court rejected the contention that the Export Clause precludes the United States from taxing the income that a taxpayer derives from export transactions. In *Peck & Co.*, more than two thirds of the taxpayer's income had been derived from export sales. *Id.* at 172. The taxpayer paid the federal income tax on its entire income and brought suit to recover the part of the tax paid on the income from export sales.

In a relatively brief opinion by Justice Van Devanter, the Court denied recovery. The decision is often stated to rest upon the fact that the tax was upon net, rather than gross, income. See L. Tribe,

American Constitutional Law § 6-19, at 463 n.18 (2d ed. 1988).[9] Indeed, the opinion states (247 U.S. at 175):

> At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.

But the Court did not rest its decision in *Peck & Co.* wholly upon that explanation. Instead, the Court further stated (247 U.S. at 174-175 (emphasis added)):

> The tax in question is unlike any of those heretofore condemned. * * * On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (*see Stanton* v. *Baltic Mining Co.*, *supra*, pp. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or occurring from all sources". *There is no discrimination. At most, exportation is affected only indirectly and remotely.*

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[9] That explanation, however, suggests as many questions as it purports to answer. What if the income tax were imposed only on net income from export sales? Or what if net income from export sales were taxed at a rate higher than net income from domestic transactions? Would either such "net" income tax survive a challenge under the Export Clause?

The fact that the federal income tax is a "general tax" that applies to all sources of income without "discrimination" is the more persuasive basis for the Court's decision in *Peck & Co.* That reasoning is a more complete explanation of the Court's conclusion (see note 9, *supra*) and it builds directly upon the analysis applied by the Court in *Turpin* v. *Burgess* and *Cornell* v. *Coyne*. That reasoning also anticipates the recent decisions of this Court under the Import-Export and Commerce Clauses.

b. During the following decades, there were further indications that the Court was reconsidering whether the Constitution immunizes interstate and foreign transactions from generally applicable, nondiscriminatory taxes. For example, in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), in upholding application of a nondiscriminatory, generally applicable state tax to a taxpayer engaged in interstate commerce, the Court heavily qualified the broad Commerce Clause rationale of *Robbins* on which *Hvoslef* relied (303 U.S. at 254, quoting *Postal Telegraph-Cable Co.* v. *City of Richmond*, 249 U.S. 252, 259 (1919)):[19]

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their fair share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way" * * *.

[19] See also *General Motors Corporation* v. *Washington*, 377 U.S. 436 (1964); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100 (1975).

And, in *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951), the Court indicated a revised view of the proper treatment of taxes upon transactions related or collateral to importation and exportation when it wrote (*id.* at 514-515):

> The difference [between this case and cases such as *Spalding*] is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. * * * [W]hen the tax is on activities connected with the export or import the range of immunity cannot be so wide.

c. Full reconsideration of these issues ultimately came in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). See also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984). Those decisions expressly overruled several of the decisions previously discussed and, without cataloging them in detail, rejected other decisions that had disposed of the same issues in the same fashion.

(i) *Michelin Tire* involved the constitutionality of a state property tax as applied to imported tires held in the importer's warehouse in Georgia. Invoking the "original package" doctrine applied in *Low* v. *Austin*, the importer maintained that its imported tires were exempt from state tax. The Court rejected that claim, holding that (423 U.S. at 279):

> Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires is not within the constitutional prohibition against laying "any Imposts or Duties on Imports" * * * and * * * insofar as *Low* v. *Austin*, 13 Wall. 29

(1872) is to the contrary, that decision is overruled.

In reaching that decision, the Court reviewed the text and objectives of the Import-Export Clause, as well as its historical origin. 423 U.S. at 283-286. The Court noted that the considerations that gave rise to the Clause were that: (i) the federal government must speak with one voice in regulating commercial relations with foreign governments, and state tariffs on exports and imports could conflict with that requirement; (ii) import revenues were to be the major source of revenue to the federal government and should not be diverted to the States; and (iii) harmony among the States would be disrupted if the seaboard states with good harbors could tax goods passing through their harbors to or from their neighbors. *Id.* at 285.

The Court concluded that nondiscriminatory property taxes would interfere with none of the objectives of the Import-Export Clause. 423 U.S. at 286-290. Noting that the text of the Import-Export Clause—proscribing imposts and duties on imports and exports—did not clearly encompass general property taxes, the Court "decline[d] to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" (423 U.S. at 293-294). The Court emphasized that (*id.* at 287):

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.

The Court further explained that the "original package" language of *Brown* v. *Maryland* had been misunderstood (423 U.S. at 298):

> [I]t is clear that the Court's view in *Brown* [v. *Maryland*] was that merely because certain actions taken by the importer on his imported goods would so mingle them with the common property within the State as to "lose their distinctive character as imports" and render them subject to the taxing power of the State, did not mean that in the absence of such action, no exaction could be imposed on the goods. Rather, the Court clearly implied that the prohibition would not apply to a state tax that treated imported goods in their original packages no differently from the "common mass of property in the country"; that is, treated it in a manner that did not depend on the foreign origins of the goods.

The Court noted that the opinion in *Low* v. *Austin* had misread Chief Justice Taney's opinion in the *License Cases*, which "makes crystal clear that the prohibition applied only to state exactions upon imports *as imports* and did not apply to nondiscriminatory ad valorem property taxes." 423 U.S. at 300. See pages 18-19, *supra*.

(ii) In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Court held that the Commerce Clause does not bar application of a generally applicable state tax to the gross revenues of a company engaged exclusively in the transportation of motor vehicles in interstate commerce. The Court reconsidered and overruled its decision in *Spector Motor*

Service, Inc. v. *O'Connor*, 340 U.S. 602 (1951), which, following *Robbins*, had held that a State could not impose a generally applicable licensing fee on persons engaged in interstate commerce. See page 22 & note 8, *supra*. The Court noted in *Complete Auto* that it was unquestioned that the activity engaged in was sufficiently connected to the State to justify a tax, that the tax was fairly related to the benefit provided to the taxpayer, that the tax did not discriminate against interstate commerce, and that it was not unfairly apportioned. 430 U.S. at 287. Under those circumstances, the Court concluded that "the *Spector* rule does not address the problems with which the Commerce Clause is concerned" and overruled that decision. *Id.* at 288. The Court's holding in *Complete Auto* necessarily, albeit implicitly, overruled *Robbins* and the "long line of 'drummer cases'" that that decision had spawned. See note 8, *supra*.

(iii) In *Department of Revenue of Washington* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), the Court considered the State of Washington's renewed attempt to apply its gross receipts tax to the proceeds from loading and unloading ocean-going vessels. In the earlier decisions in *Puget Sound* and *Joseph v. Carter & Weekes*, the Court had invoked the Commerce Clause to hold unconstitutional the application of state gross receipts taxes to the proceeds of stevedoring cargoes in interstate and foreign commerce. See page 24, *supra*. In *Washington Stevedoring*, however, the Court had little difficulty, after *Complete Auto*, in overruling those decisions insofar as the Commerce Clause was involved. 435 U.S. at 743-751.

The Import-Export Clause required separate consideration. *Michelin Tire* had inquired whether a

generally applicable tax that did not favor or disfavor imports or exports conflicted with any of the policies leading to the adoption of the Import-Export Clause and had upheld the application of the property tax to imported goods, whether or not in the original package, when it found no friction or inconsistency. A similar inquiry led the Court to conclude in *Washington Stevedoring* that the generally applicable Washington tax on gross receipts from stevedoring offended none of the policies of the Import-Export Clause. 435 U.S. at 754-755. The Court specifically rejected the suggestion that the fact that *Michelin Tire* dealt only with goods no longer in transit required that the cases be differentiated. *Id.* at 755-757. The Court explained that *Canton Railroad* demonstrated that the analysis applied in *Michelin Tire* was not to be discarded simply because the goods were in transit. *Ibid.* Moreover, the fact that *Michelin Tire* involved only imports while the tax involved in *Washington Stevedoring* related to proceeds from services for both imports and exports did not call for a different conclusion. *Id.* at 757-758. The Court held that the considerations that led to the decision in *Michelin Tire* were equally applicable to the Washington tax. *Ibid.*[11]

(iv) The Court's decision in *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), serves as a supplement to these three significant modern decisions. In

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[11] Justice Powell concurred separately in *Washington Stevedoring*. He concluded that the controlling factor in that case, as in *Michelin Tire*, was that local taxpayers should not be required to subsidize the services used and enjoyed by importers and exporters; instead, the consumer of such goods should pay for the services rendered by government just as they paid transportation costs. 435 U.S. at 761-764.

Limbach, the Court made clear that more than a few named decisions had been overruled by *Michelin Tire*, *Complete Auto*, and *Washington Stevedoring*. In overruling an earlier decision that had invalidated the application of a "nondiscriminatory ad valorem personal property tax to imported fibers still in their original packages" (466 U.S. at 354), the Court emphasized that the reasoning that underlay such decisions had been "*repudiated*" (*id.* at 362). The fact that the Court had not explicitly named and cataloged all of the cases whose reasoning had been rejected in its more recent decisions did not mean that those earlier decisions retained "current validity." *Id.* at 361.

7. *Application of The Modern Doctrine to the Export Clause.* The reasoning of the Court in *Michelin Tire* and *Washington Stevedoring* applies equally to nondiscriminatory federal taxes under the Export Clause. Those decisions demonstrate that, when a generally applicable, nondiscriminatory tax is at issue, the mere fact that the tax applies also to goods that are in the export or import process does not provide a constitutional immunity from taxation. See pages 27-29, *supra*. And, as the Court has repeatedly emphasized since *Brown* v. *Maryland*, the Export and Import-Export Clauses are complementary in scope. See pages 16-17, *supra*.[12]

As the court of appeals acknowledged in this case (Pet. App. 4a), and as Madison's *Notes of Debates* and Warren's *The Making of the Constitution* demonstrate, the Export Clause resulted from one of the sectional divisions that marked the Constitutional Convention.[13] In particular, it stemmed from the "concern that a Congress controlled by the more numerous and populous Northern States would impose burdensome levies on Southern exports" (Pet. App. 4a), including the "three great crops which grew nowhere else,—tobacco, rice, and indigo" (note 13,

[12] Most recently, in *Washington Stevedoring*, the Court cited *Spalding* (an Export Clause case) along with cases involving state taxes and the Import-Export Clause to illustrate reasoning that was no longer approved. 435 U.S. at 752.

[13] See Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 305-308, 359-363, 441-442 (1966) (proceedings of August 16, 21, 28, 1787); C. Warren, *The Making of the Constitution* 570-574 (reprint 1993) (1928). The central portion of Warren's description is as follows (at 571-572) (footnote omitted):

> The question of a prohibition of taxes and duties on exports now brought these sectional differences into an outbreak in the Convention.
>
> It is to be noted, as a preliminary to consideration of this clash, that the Committee's proposal to forbid export duties was a very radical departure from the theory and practice theretofore prevailing in government taxation. As has been well said: "To attempt to organize a Government without the power to tax exports was a innovation. From time immemorial, every nation had taxed whatever productions of its soil its inhabitants might presume to export. In the old economy, its maxim was to tax exports but to admit imports free." The prohibition of export duty now inserted in the new Constitution was not based, however, on any change in economic theory but on purely political and sectional conditions. The South, being agricultural and having three great crops which grew nowhere else,—tobacco, rice, and indigo—feared that the possession of this power by Congress could enable the North to discriminate against it, by a tax which would operate only on the peculiarly Southern articles of export. This fear had been expressed early in the Convention.

supra). This narrow historical purpose of the Export Clause is complemented by the narrow language employed in the Clause, which proscibes only federal taxes "laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5).

There is obviously no basis for respondent to contend that the generally applicable tax on insurance imposed by Section 4371 of the Internal Revenue Code conflicts with the policies that the Export Clause embodies. This federal tax applies to many forms of insurance that have no relation whatever to exports or the export process (such as life insurance, sickness and accident policies, indemnity bonds and annuity contracts). See 26 U.S.C. 4371(1), (2). Even as applied to casualty insurance, the tax unquestionably has only an incidental and remote relationship to exports and the export process—and it applies equally to wholly domestic commerce as well.[14] That the statute does not discriminate against exports is clear from its text, for it applies to insurance for any risk that arises either "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). As this Court stated in upholding the constitutionality of the federal tax challenged in *Peck & Co.* v. *Lowe*, 247 U.S. at 175, "There is no discrimination. At most, exportation is affected only indirectly and remotely."

In view of the limited purpose and narrow language of the Export Clause, there is no adequate rationale for sifting through all possible applications of a generally applicable, nondiscriminatory federal tax to

[14] Even within the specific category of casualty insurance, the statute applies to risks that have little or no connection with exports and exportation--such as fire, flood and earthquake.

proscribe its application in remote contexts involving exported goods. Consider, for example, a hypothetical transaction that is not unrelated to the facts of this case. A ship sets out from California with a cargo produced in Arizona. Part of the cargo will be offloaded in British Columbia to a buyer doing business there. The remainder of the cargo will be delivered to a buyer in Alaska. The cargo has been insured by a foreign insurer against damage or loss for its entire journey—beginning with its loading on trucks in Arizona and until delivery at the places of business of the buyers in British Columbia and Alaska. The nondiscrimination policies embodied in the Export Clause plainly do not require that the insurance covering the part of the cargo delivered in British Columbia be made exempt from the federal tax on insurance while the Alaska portion of cargo is not. That would turn the constitutional shield against discrimination in the Export Clause into a sword requiring "preferential treatment" for exports and "that permits escape from uniform taxes" imposed without discrimination (*Michelin Tire Corp.* v. *Wages*, 423 U.S. at 287).

As this Court noted in *Cornell* v. *Coyne*, 192 U.S. at 427, the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." The United States—like the States—assists and protects respondent's shipments over highways within the United States (financed in substantial part by the federal government) as well as in the movement of such goods by sea or air beyond our borders. As a nondiscriminatory, generally applicable tax designed to raise revenues for the performance of government services, the tax imposed by

Section 4371 is not unconstitutional. Here, as in *Peck & Co.* v. *Lowe*, the tax should be upheld because it is "not laid on" exports or the export process uniquely "or in a discriminative way" (247 U.S. at 174).

It should be emphasized that the Commerce Clause provides Congress with comprehensive authority over exports as well as imports. It was established early that Congress has the power to embargo or otherwise control the export of such goods or materials as the national interest indicates. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 191-192 (1824); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 566-567 (1850); *United States* v. *The William*, 28 Fed. Cas. 614, 620-623 (D. Mass. 1808) (No. 16,700).[15] It is also clear that Congress may take into account—both in regulating commerce with foreign nations and in laying and collecting taxes—the competitive advantages enjoyed by foreign nationals and foreign corporations. *Board of Trustees* v. *United States*, 289 U.S. 48, 58 (1933). The Export Clause removes only a small and narrowly defined area from the wide-ranging authority provided to the Congress by the Constitution.

Considering the origin, text and narrow objectives of the Export Clause, the role of that Clause within the broader structure of the Constitution, and this Court's recent decisions, the prohibitions of that Clause should be confined to discriminatory taxes

---

[15] This authority has recently been exercised in the enactment of the Export Administration Act of 1979, 50 U.S.C. App. 2401-2420. See *Moller-Butcher* v. *United States Department of Commerce*, 12 F.3d 249 (D.C. Cir. 1994); *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), cert. denied, 113 S. Ct. 1273 (1993).

imposed specifically upon "Articles exported." The generally applicable, nondiscriminatory tax on insurance imposed by Section 4371 of the Internal Revenue Code does not violate that standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

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QUESTION PRESENTED

Whether the Export Clause of the U.S. Constitution precludes the application of § 4371 of the Internal Revenue Code to premiums paid for casualty insurance on export shipments. To accept the Government's argument that the Export Clause permits the tax, this Court would have to overrule *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915).

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Rev. Rul. 57-256, 1957-1 C.B. 416 4

Miscellaneous:

Peter V. Bergstrom, *Markets and Merchants: Economic Diversification in Colonial Virginia, 1700-1775* (1980) 34
The Compact Edition of the Oxford English Dictionary (1971) 38
The Documentary History of the Ratification of the Constitution (John P. Kaminski & Gaspare J. Saladino ed. 1988) 36
Max Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1966) 11-12, 34-39
The Federalist (Clinton Rossiter ed. 1961) 12, 41
13 The Papers of Benjamin Franklin (Leonard W. Labaree ed. 1969) 37-38
Emory R. Johnson, T.W. Van Metre, G.G. Huebner & D.S. Hanchett, *History of Domestic and Foreign Commerce of the United States* (1915) 34
Samuel Johnson, *Dictionary of the English Language* (1755) 38

Clinton Rossiter, *1787 -- The Grand Convention* (Norton ed. 1987) 11
Thomas P. Slaughter, *The Whiskey Rebellion* (1986) 38
Joseph Story, *Commentaries on the Constitution of the United States* (1833) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-591

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *Respondent.*

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION

CONSTITUTIONAL PROVISIONS INVOLVED

The Government's brief adequately sets out the statutory provisions relevant to this case (U.S. Br. 2-4). A fuller presentation of the relevant provisions of the Constitution of the United States is as follows:

a. Art. I, § 8, cl. 1:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

b. Art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

c. Art. I, § 9, cl. 4:

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

d. Art. I, § 9, cl. 5:

"No Tax or Duty shall be laid on Articles exported from any State."

e. Art. I, § 9, cl. 6:

"No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another."

f. Art. I, § 10, cl. 2:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

STATEMENT OF THE CASE

Respondent International Business Machines Corporation (IBM) brought this suit in the United States Court of Federal Claims to obtain a refund of $826,054.55 in taxes assessed under § 4371 of the Internal Revenue Code.[1] Section 4371 (26 U.S.C. § 4371) imposes a tax of four cents per dollar on insurance premiums paid to a foreign insurer for insurance against risks or losses wholly or partly within the United States. *See* 26 U.S.C. §§ 4371 & 4372. As an exporter of computers and other business products, IBM purchased — either directly or through its foreign subsidiaries — casualty insurance to protect against the risk of loss or damage to its products during the export process. The insurance was "point to point"; that is, it applied to each shipment from the time it left IBM's facility in the United States until arrival at the foreign destination. A separate premium was charged for each shipment, with the amount determined by the value of the shipment and underwriting factors such as the time and distance of the trip.[2]

When the insurance was purchased by IBM's foreign subsidiary, a foreign insurance company would typically issue

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[1] The amount of $1.5 million referenced in the Government's brief (U.S. Br. 5) includes both taxes and interest. *See* Pet. App. 33a.

[2] Pet. App. 39a. IBM exported products to diverse countries around the world, including Abu Dhabi, Argentina, Belgium, Brazil, Canada, Egypt, Germany, Haiti, India, Japan, Kuwait, Malaysia, Norway, Peru, South Africa, Switzerland, Thailand, the former U.S.S.R., Vietnam, and Zambia. The insurance applied during the inland leg in the United States, the overseas portion of the journey, and the inland segment within the foreign country, but in all cases insurance coverage did not commence until the shipment had been tendered in the United States to a common carrier for direct shipment abroad. Pet. App. 36a-39a.

the policy. The statutory language of § 4371 would thus be triggered, even though only a small portion of the voyage occurred within the United States. The tax applies where a domestic company is insured by a foreign insurer against risks "wholly or partly" within the United States (26 U.S.C. § 4372(d)), and the Government has construed this to mean that the tax applies to the entire premium for insurance on an international shipment, without apportionment, if more than a "trifling" portion of the shipment is within the United States. *See* Rev. Rul. 57-256, 1957-1 C.B. 416.

Eighty years ago, this Court held in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), that a similar federal tax levied against premiums paid for marine casualty insurance was unconstitutional as applied to export shipments. The reason was the Export Clause of the Constitution: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Court in *Thames & Mersey* concluded that a tax upon insurance policies covering export shipments was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition . . . ." 237 U.S. at 25, *quoting United States* v. *Hvoslef*, 237 U.S. 1, 13 (1915). Based on the authority of *Thames & Mersey*, IBM took the position that the Internal Revenue Service could not constitutionally apply § 4371 to casualty insurance premiums for its export shipments.[3]

---

[3] An earlier version of § 4371 (Revenue Act of 1921, ch. 136, §§ 1107, 42 Stat. 227, 306) was -- presumably in deference to *Thames & Mersey* -- accompanied by a regulation that administratively excluded insurance on exports from the scope of the tax:

(continued...)

After audit of IBM's tax returns for the years 1975 through 1984, the Internal Revenue Service maintained that IBM was liable for the § 4371 tax insofar as the policies purchased from foreign insurers applied to IBM's exports from the United States. (Pet. App. 17a) IBM paid the tax under protest and filed suit for refund. In the lower courts and in its briefing to this Court, the Government has conceded that — if the Export Clause was correctly interpreted and applied in *Thames & Mersey* — then the tax here is also unconstitutional as applied and that IBM is entitled to a full refund. (Pet. App. 1a & 22a; U.S. Br. 12 n.3)

On stipulated facts, the Court of Federal Claims (Senior Judge Thomas J. Lydon) granted IBM's motion for summary judgment and denied the Government's cross-motion. The court held that, on the facts presented, "the tax imposed by § 4371 is a tax that amounts to a tax on exports" (Pet. App. 26a); that *Thames & Mersey* was controlling (*id.* 27a); and that recent Court decisions under the Import/Export Clause[4] could not be read as rejecting this Court's established rulings under the Export Clause (*id.* 27a). As an alternative ground, Judge Lydon also ruled that the federal tax here and in *Thames & Mersey* were distinguishable from the state taxes

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[3](...continued)

> "No tax is imposed upon the premium charged for insurance issued to cover commodities which are in the actual process of exportation and which have begun their voyage or preparation for the voyage from the United States."

Reg. 55, art. 110(a) (CCH Fed. Tax Serv. 1926 ed.). The regulation lapsed without explanation.

[4] Principally *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

upheld in recent Import-Export Clause rulings:

> "Thus, even if the government is correct in its assertion that all taxes that involve exports, whether considered in light of the Export Clause or the Import-Export Clause, should be examined to see if they discriminate against exports *qua* exports, it appears that in the Court's view a tax such as that imposed by § 4371 could indeed be considered a tax on exports in their capacity as exports"

and thus was unconstitutional as applied. (Pet. App. 29a) This was because § 4371 amounted to an ad valorem tax on export goods in transit,[5] a type of tax that this Court's recent Import/Export Clause rulings indicated was distinguishable from the state taxes that were there upheld. (*Id.* 29a)

The Federal Circuit Court of Appeals affirmed in a unanimous decision by Judge William C. Bryson (Chief Judge Archer and Judge Plager joining). After reviewing the history of the Export Clause, the court of appeals observed: "Acknowledging the importance of the Export Clause and its flat prohibitory language, the Supreme Court has consistently given the Clause a broad construction." (*Id.* 5a) While this Court has in recent years narrowed its construction of the Import/Export Clause applicable to state taxation,

> "[s]upport for the continuing vitality of *Thames & Mersey* can be found both in the Court's Import-Export Clause decisions and in the distinctions in language and policy between the Import-Export Clause and the Export Clause." (*Id.* 9a)

---

[5] The tax imposed by § 4371 varies directly with the declared value of the export shipment. Pet. App. 39a.

Hence, on the basis of established precedents and the "undisputed applicability of *Thames & Mersey*" (*id.* 11a), the court of appeals held that the § 4371 tax as applied to IBM's export shipments was unconstitutional.

SUMMARY OF ARGUMENT

I. *Thames & Mersey* correctly applied the Export Clause in prohibiting the imposition of a federal excise tax on premiums for casualty insurance that covers export shipments. Although the federal government generally has broad authority to levy taxes, the Export Clause is an express and unequivocal restriction on that power: "No Tax or Duty shall be laid on Articles exported from any State." This is not simply a prohibition of taxes that discriminate against exports -- *i.e.*, taxes that are levied on exports *qua* exports. *E.g.*, *Fairbank* v. *United States*, 181 U.S. 283, 292 (1901); *United States* v. *Hvoslef*, 237 U.S. 1 (1915). Instead, the Export Clause has consistently been read as an exemption from *all* federal taxes as applied to the export process. "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" *Fairbank* v. *United States*, 181 U.S. at 290. Insurance is an integral part of the export process, and the premiums paid vary directly with the value of the product. As *Thames & Mersey* concluded, a federal excise tax as applied to such insurance is an impermissible tax on the export process.

II. The Government argues that the Court should now adopt the "modern doctrine" developed under the Import/-Export Clause to overrule *Thames & Mersey* and, indeed, to repudiate this Court's analysis in a half-dozen other Export Clause cases. The argument that the Export Clause should now be reinterpreted to fit the new Import/Export Clause mold has no justification -- historical *or* modern. The proposed

interpretation distorts the plain meaning of a constitutional provision that was an important compromise at the 1787 Constitutional Convention, and one that has been consistently understood as exempting the export process from federal taxation, discriminatory or not. The § 4371 tax at issue here fits squarely within the scope of the Export Clause as construed and applied in a long line of Court decisions.

Moreover, the Government's argument would require the Court to disregard -- indeed, to repudiate -- the analysis in the same "modern" cases on which the Government relies. This is because the Court, when it recently reinterpreted the Import/Export Clause to permit greater freedom for State taxation, applied an analysis that *supports* rather than undermines the historically broad scope of the Export Clause. The Court stressed that the Import/Export Clause prohibits only State "imposts" and "duties," and "just as clearly, the Clause is *not* written in terms of a broad prohibition of every 'tax.'" *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290 (1976) (emphasis in original). *See also Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 759 (1978). By comparison, the Export Clause does say "No Tax." Moreover, the modern Import/Export Clause cases turned on the Court's understanding of the specific and narrow purposes that underlay that constitutional provision, purposes that were not frustrated by non-discriminatory state taxation. The Export Clause, by contrast, was designed to serve broader purposes and was intended by the Framers to be absolute and unqualified in scope. The Framers intended that "exports should not be made a source of revenue to the National Government" (*Fairbank* v. *United States*, 181 U.S. at 292), and nothing in the newer cases cited by the Government supports a different conclusion.

III. Even if the Government were right that the Export Clause and Import/Export Clause should be construed in

identical fashion, the result in this case is still unchanged. As the Claims Court below ruled in its alternative holding, the § 4371 tax at issue here -- like the tax in *Thames & Mersey* -- applies to goods during the international journey and bears a direct relation to the value of those goods. This is unlike the state taxes upheld in *Michelin* and *Washington Stevedoring*, where in one case the goods were not in transit and in the other the tax was unrelated to value. Indeed, *Washington Stevedoring* distinguished *Thames & Mersey* on the ground that a tax on insurance premiums varies directly with the value of the goods. Thus, even under the Import/Export Clause analysis set forth in the Court's recent decisions, the federal excise tax here is still unconstitutional as applied.

ARGUMENT

I. This Court Has Consistently Held that the Export Clause Precludes the Imposition of Federal Taxes on the Export Process, Whether or Not the Tax Is One of General Applicability. *Thames & Mersey*, Which Controls on the Facts in This Case, Is Part of that Unbroken Line of Authority.

The Government's brief (U.S. Br. 19-26) may leave the impression that the Court has vacillated in its interpretation of the Export Clause, sometimes viewing the issue of discrimination against exports as important and other times not. That is not so. The Court's reading of the Export Clause has been entirely consistent: the process of exportation is immune from federal taxation, period. This includes the articles of export themselves, as well as the documents and transactions involved in the export process. The issue of discrimination has been relevant only when the tax at issue did not apply *during* or *to* the export process. But if the tax applies during or to

the export process, the Constitution prohibits federal taxation, whether or not the tax is specifically directed at exports *qua* exports.

Thames & Mersey is squarely within this unbroken line of precedent. It holds that even a non-discriminatory excise tax may not be applied to casualty insurance purchased for export shipments because such a tax is "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition . . . ." 237 U.S. at 25, *quoting United States* v. *Hvoslef*, 237 U.S. at 13. *Thames & Mersey* controls on the facts of this case.

A. The Court's Consistent Reading of the Export Clause

The Export Clause has not needed frequent judicial consideration, presumably because its text is clear enough: "No Tax or Duty shall be laid on Articles exported from any State." The clause was inserted during the Constitutional Convention at the insistence primarily of the southern States, whose economies were dependent on exports of regional crops such as tobacco, rice, and indigo. Whereas under the Articles of Confederation Congress could raise revenue only by requisitioning funds from the States, the Constitution was to give the federal government the unaccustomed power to impose its own taxes. The South, fearing that the Northern and Mid-Atlantic States would dominate Congress, insisted that exports be excepted from the taxing power.[6] Certain

[6] When in July 1787 the Convention's Committee of the Whole was to adjourn and to refer drafting matters to the Committee of Detail, General Pinckney of South Carolina

(continued...)

Northern delegates also supported the clause because they believed a tax exemption would encourage development of domestic industries[7] and because they feared the federal government might become too powerful and use its control over exports to extract concessions from the States.[8]

The Constitution that emerged from the 1787 Convention gave Congress general power to lay and collect taxes (art. I, § 8, cl. 1), but that power was subject to express limitations. Taxes and duties against exports were prohibited outright. Art. I, § 9, cl. 5. In addition, duties, imposts, and excises had to be uniform throughout the United States (art. I, § 8, cl. 1) and could not discriminate against the ports of one State

[6](...continued)

"reminded the Convention that if the Committee should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report."

Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 Max Farrand, *The Records of the Federal Convention of 1787* 95 (rev. ed. 1966) ("*Records*"). *See also id.* at 362-63 (statement of George Mason of Virginia). The August 6 report of the Committee of Detail did then include a provision that "No tax or duty shall be laid by the Legislature on articles exported from any State . . . ." *Id.* at 359 n.15. It was commented that "It seems to be feared that the Northern States will oppress the trade of the Southn." *Id.* at 359 (statement of John Langdon of New Hampshire). Various proposals to weaken the provision were considered but rejected (*id.* at 359-63), and the provision emerged from the Convention essentially unchanged. *See generally* Clinton Rossiter, *1787 -- The Grand Convention* 200, 209 & 217 (Norton ed. 1987).

[7] 2 *Records* at 360 (statement of Oliver Ellsworth of Connecticut).

[8] *E.g.*, *id.* at 362 (statement of Elbridge Gerry of Massachusetts).

over those of another (art. I, § 9, cl. 6). Direct taxes could only be laid in proportion to the census. Art. I, § 9, cl. 4. Taking these provisions as a whole, and given that the apportionment requirement was seen as a significant limitation on direct federal taxes, it was expected that taxation of imports would be the principal source of revenue for the federal government.[9] As for exports, however, "the hands of the Legislature were absolutely tied. . . -- exports could not be taxed."[10]

In light of this strong intent and the Export Clause's clear language, it is not surprising that the Court has given the Clause a broad and consistent interpretation.

1. Taxes "laid on Articles exported from any State"

One early issue of interpretation was whether the constitutional prohibition of taxes "laid on Articles exported" literally required that the tax apply directly to the exported product, or whether the Export Clause would also prohibit a tax that was levied on the export process in some other manner. In *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827), the Court addressed this issue, albeit in dictum because the case involved a state rather than federal tax and thus was decided

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[9] *See, e.g.*, The Federalist No. 12, at 93 (Alexander Hamilton), No. 36, at 222 (Hamilton), No. 41, at 262 (James Madison) (Clinton Rossiter ed. 1961).

[10] 2 *Records* at 220 (statement of Rufus King of Massachusetts). *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 470 (1833) (by virtue of the Export Clause, "[t]he power is, therefore, wholly taken away to intermeddle with the subject of exports").

under the Import/Export Clause applicable to the States.[11] Maryland required all import traders to pay a license fee, and the issue was whether that levy was "on Imports or Exports" within the meaning of the Import/Export Clause. In concluding that it was, Chief Justice Marshall referred by analogy to a hypothetical federal tax on the occupation of exporting. Such a tax, he suggested, would clearly violate the Export Clause even though not laid directly on the articles of export.[12] It was in this context -- on the issue whether a tax might be "laid on Articles exported" even though not imposed directly on the articles themselves -- that Chief Justice Marshall made the statement that is enthusiastically embraced in the Government's brief (U.S. Br. 17): "There is some diversity in language [between the Export Clause and the Import/Export Clause], but none is perceivable in the act

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[11] Art. I, § 10, cl. 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

[12] "The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

25 U.S. at 445.

which is prohibited."[13]

In accord with Chief Justice Marshall's dictum, the Court has consistently held that the Export Clause cannot be avoided by the expediency of applying a federal revenue measure to a transaction that is a part of the export process rather than to the exported products themselves. The issue was addressed most directly in *Fairbank* v. *United States*, 181 U.S. 283 (1901), which struck down a federal stamp tax on bills of lading for export shipments. The Government argued that the Export Clause did not apply because the tax applied to bills of lading and not to articles of export. The Court concluded that an express constitutional prohibition on federal powers could not be construed so narrowly.[14] An important purpose of the Constitution was to ensure "free exportation," a principle that would be violated by federal taxation of the export process:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether

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[13] 25 U.S. at 445. The Export Clause provides that "No Tax or Duty shall be *laid on* Articles exported," whereas the Import/Export Clause provides that a State may not "*lay* any Imposts or Duties *on* Imports or Exports" (emphasis added). Obviously, the diversity of language between "laid on" and "lay . . . on" does not suggest a substantive difference. Chief Justice Marshall was not, however, addressing a different and more significant variance between the two clauses -- the use of "Tax or Duty" in the Export Clause and "Impost or Duty" in the Import/Export Clause. See pages 30-31, 37-39 *infra*.

[14] "[I]f the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety." 181 U.S. at 289.

> such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and . . . no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of ten cents on bills of lading on goods to be exported it is because it has power to do so, and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution."

181 U.S. at 290-91. Thus:

> "[T]he freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance."

Id. at 295.

The Court reaffirmed this principle in *United States* v. *Hvoslef*, 237 U.S. 1 (1915), and *Thames & Mersey Marine*

Ins. Co. v. *United States*, 237 U.S. 19 (1915). The first struck down a federal tax on charter parties to the extent that the tax was applied to charters for export shipments. Rejecting the Government's argument that the tax "only incidentally and remotely affected articles exported" and "was not a tax on articles exported" (237 U.S. at 4), the Court held that the Export Clause "is designed to give immunity from taxation to property that is in the actual course of exportation" and "[t]his constitutional freedom . . . plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves." *Id.* at 13. Under the facts of the case,

> "[t]he charters were for the exportation; they related to it exclusively; they serve no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."

Id. at 17. Similarly in *Thames & Mersey* (about which more later, pp. 25-26), the Court struck down a federal excise tax on insurance premiums as applied to marine insurance for export shipments: "proper insurance during the voyage is one of the necessities of exportation," and thus the excise tax on premiums "falls on the exporting process" and hence is "within the constitutional prohibition." 237 U.S. at 27.[15]

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[15] *See also United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906), which involved a federal stamp tax on cargo manifests for ships bound for foreign ports. The United States conceded that the tax was unconstitutional under the authority of *Fairbank* but nonetheless prevailed on the ground that the taxpayer had failed to protest the tax at the time of payment.

This line of Export Clause cases was aptly summarized in *Willcuts* v. *Bunn*, 282 U.S. 216, 228 (1931):

> "[W]ith respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. [Citing *Fairbank*, *Hvoslef*, and *Thames & Mersey*.] Only on that construction can the constitutional safeguard be maintained."

2. Taxes not specifically directed at the export process

Although characterizing the § 4371 tax as having "only an incidental and remote relationship to exports and the export process" (U.S. Br. 34), the Government does not challenge the principle just discussed that the Export Clause applies to taxes on the export process as well as to taxes on articles of export. Indeed, the Government endorses *Fairbank* v. *United States* as a correct interpretation of the Export Clause (*see* U.S. Br. 21-23), and *Fairbank* addresses most fully the principle that a tax on the export process is a tax "on Articles exported." Instead, the Government argues that the Export Clause should be confined to discriminatory taxes that are imposed specifically upon exports, and that a generally applicable tax should be allowed even to the extent it applies to exports.

On this point too, the Court's decisions have been consistent and unwavering. If a federal tax is applied to or during the export process, it violates the Export Clause even if non-discriminatory. If, however, the tax applies prior to or after the export journey, the tax is unconstitutional if it discriminates against exports but constitutional if it does not.

As for the Government's argument that non-discriminatory taxes may be applied to the export process itself, this Court has consistently rejected that position. While the Constitution contains other provisions designed to prohibit discriminatory federal taxation,[16] the Export Clause is an unqualified exception from the power to tax.

Our discussion on this point begins with the first case in which the Court was asked to consider an Export Clause challenge to a federal revenue measure. In 1868, Congress had enacted an excise tax on the manufacturing of tobacco but exempted all tobacco intended for export. The same statute required, however, that exempted tobacco be packaged with an identifying stamp for which the government charged a fee of 25 cents. That fee was challenged as violative of the Export Clause in *Pace* v. *Burgess*, 92 U.S. 372 (1876), but the Court rejected the claim on the ground that the fee was not a "tax" or "duty" within the meaning of the Clause. The stamp was intended only to separate and identify tobacco that was exempt from the standard tax, and the fee bore no relationship to the quantity or value of the export package and was intended only to cover the costs of administering the tax

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[16] *See* art. I, § 8, cl. 1 (all duties, imposts, and excises must be uniform throughout the United States); art. I, § 9, cl. 6 (no discrimination between ports in terms of regulation or revenue). In the *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), the Court compared "qualifications" on the federal taxing power with the "exception" granted for export commerce:

> "[T]he power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment [art. I, § 9, cl. 4] and indirect taxes by the rule of uniformity [art. I, § 8, cl. 1]."

exemption. Thus, the fee was not a "tax" or "duty" subject to the constitutional prohibition.[17]

The same statute returned to the Court in *Turpin* v. *Burgess*, 117 U.S. 504 (1886). In 1882, Congress repealed the exemption stamp fee but in so doing described the fee as an "export tax." Seizing on that terminology, another tobacco manufacturer sought to recover past payments. The Court rejected the claim, reaffirming its holding in *Pace* v. *Burgess* that the stamp fee did not amount to a "tax." The Court was unimpressed by the subsequent congressional characterization of the fee, suggesting that Congress may have unwittingly adopted a term proposed by industry lobbyists. *Id.* at 505-06.

The Court went on, though, to state an alternative rationale -- one that laid the groundwork for all subsequent decisions under the Export Clause. In discussing both the Export Clause and the Import/Export Clause, the Court stated:

> "The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, *or whilst they are being exported*. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a *general tax*, laid on all property alike, *and not levied on goods in*

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[17] Consistent with *Pace* v. *Burgess*, the rule has developed that the Export Clause does not prohibit user fees or other similar charges that are not general revenue measures but instead are regulatory in nature or designed only to defray governmental expenses specifically associated with export of the products in question. *E.g.*, *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595-96 (1884); *Moon* v. *Freeman*, 379 F.2d 382, 391-92 (9th Cir. 1967). Here, the Government has conceded that § 4371 is a "tax" in the constitutional sense and does not qualify for this regulatory exception. *E.g.*, Pet. App. 6a, 17a-18a, 22a.

> *course of exportation, nor because of their intended exportation*, is not within the constitutional prohibition."

117 U.S. at 507 (emphasis added).

Thus, the Export Clause would prohibit any tax -- even a "general tax" -- if it is levied on goods "whilst they are being exported" (or, "in course of exportation"). On the other hand, if the tax is imposed *prior* to commencement of the export process, the validity of the tax will depend on whether it is specifically directed at exports (*i.e.*, on whether the goods are taxed "because of their intended exportation"). This issue of discrimination is not relevant, though, if the tax applies during or to the export process. Based on this standard, the *Turpin* Court concluded that the tobacco stamp levy was not objectionable because "the tax (if it was a tax) was laid upon the goods before they had left the factory" and thus "were not in course of exportation." *Id.* at 507. Nor, in the circumstances of the case, did the stamp fee discriminate against exports. *Id.* at 507-08.[18]

The Court applied this identical standard in *Cornell* v. *Coyne*, 192 U.S. 418 (1904), which considered the constitutionality of a federal excise tax on the manufacturing of

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[18] This latter point was true because the stamp fee permitted exports to be charged at a lower rate than domestic goods:

> "A special indulgence was granted to [plaintiffs] (in common with others), in reference to the particular tobacco which they declared it to be their intention to export. . . . In this view of the case, the plaintiffs not only had no ground of complaint, but they were really the objects of favorable treatment on the part of the government, which, on the slight and easy conditions referred to, accepted their declared intention to export the tobacco in question, before it was commenced to be exported, or put in the way of exportation."

filled cheese. The tax was non-discriminatory as to cheese manufactured for domestic and export markets, but the taxpayer argued that the Export Clause nevertheless precluded application of the tax to cheese that was manufactured under contract for export and that was then in fact exported. The Court rejected the taxpayer's argument, but not simply because the tax was non-discriminatory. Rather, the tax was constitutional because it was *both* non-discriminatory *and* applied to the manufacturing process *prior* to the commencement of the export journey:

> "A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that *no burden by way of tax or duty can be cast upon the exportation of articles*, and does not mean that articles exported are relieved from the *prior* ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article *before its exportation*."

192 U.S. at 427 (emphasis added).

Under the Government's proposed theory of the Export Clause, the Court in *Cornell* reached the right result for the wrong reason; because the tax was non-discriminatory, that should have been the end of the analysis. However, the Court did not apply the Government's proposed analysis but instead applied the analysis of *Turpin* v. *Burgess*: the tax was constitutional only because it was both non-discriminatory and was not applicable to the export process. And, in so ruling, the Court reaffirmed that the export process itself was exempt from any taxation, whether discriminatory or not.

Hvoslef and *Thames & Mersey*, both decided eleven years after *Cornell*, were therefore not aberrations or unwitting missteps, as the Government suggests, but instead represented consistent applications of the standard already announced in *Turpin* v. *Burgess* and *Cornell*. *Hvoslef* involved a non-discriminatory federal tax on contracts for ship charters, and the Court held that the tax violated the Export Clause to the extent it was applied to charters for export shipments: "the tax as applied to the [export] charter parties here in question was nothing else than a tax on exportation and to this extent was in any event invalid." 237 U.S. at 17-18. The tax on insurance premiums in *Thames & Mersey*, while again not discriminating against exports, met the same fate to the extent the tax was applied to export shipments. In both cases, the tax applied to the export process itself and thus, as applied, violated the Export Clause even though non-discriminatory.

The Court's next Export Clause decision was *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918), which held that the new federal income tax made possible by the Sixteenth Amendment could be applied to all income of a domestic corporation, including income derived from exports. The Government suggests (U.S. Br. 24-26) that *Peck & Co.* was in tension with *Hvoslef* and *Thames & Mersey*, decided just three years earlier, and supports the "modern" theory of the Export Clause it urges in this case. In support of that suggestion, the Government states that *Peck & Co.* stressed the non-discriminatory aspect of the tax in question (with citations to *Turpin* and *Cornell*), whereas non-discrimination had not saved the taxes that had been struck down in *Hvoslef* and *Thames & Mersey*.

There is no tension, however, because *Peck & Co.* applied precisely the same standard that has been applied in all the Court's decisions under the Export Clause. Citing both *Hvoslef* and *Thames & Mersey* and quoting with approval from

the latter, the Court in *Peck* reiterated that the Export Clause excepts from the federal taxation power

> "articles in the course of exportation, the act or occupation of exporting, bills of lading for articles being exported, charter parties for the carriage of cargoes from state to foreign ports, *United States* v. *Hvoslef, 237 U.S. 1;* and policies of marine insurance on articles being exported, -- such insurance being uniformly regarded as 'an integral part of the exportation' and the policy as 'one of the ordinary shipping documents,' *Thames and Mersey Insurance Co.* v. *United States*, 237 U.S. 19. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which *directly* burdens the exportation.' *Fairbank* v. *United States*, [181 U.S.] at 292-293."

247 U.S. at 173 (emphasis in original; other citations omitted).

Applying this standard, the Court upheld the income tax in *Peck & Co.* because the tax was "not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes." *Id.* at 174. The tax applied only to net income, based on all the company's revenues and costs and calculated well after the exportation process was finished. The tax was thus analogous to the manufacturing taxes in *Turpin* v. *Burgess* and *Cornell*, which were applied prior to the start of the export journey. It was in this context -- a tax not applied to the export process itself -- that the issue of discrimination was relevant.

The fact that *Peck & Co.* did not signal a revised construction of the Export Clause is proven by *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), where five years after *Peck* the Government made and lost precisely the same argument that it advances today. *Spalding* involved a federal excise tax on the sale of sporting equipment. Although the tax was non-discriminatory, the Spalding company challenged its application to sales made in export commerce. The Solicitor General, in seeking to defend the tax, argued that discrimination was the sole issue:

> "From the history of the Export Clause in the Constitution, it will appear that the framers had in mind a tax levied directly and deliberately upon the act of exportation. They were not considering the application of general taxing laws, which might fall in individual cases upon merchandise, which might thereafter be exported."

Id. at 66. The Court, in a unanimous decision by Justice Holmes, flatly rejected the Government's argument:

> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State', because that is forbidden in terms by the Constitution. Article I, § 9. *United States* v. *Hvoslef*, 237 U.S. 1, 18. . . . Articles in course of transportation cannot be taxed. *William E. Peck & Co.* v. *Lowe*, 247 U.S. [at] 173."

262 U.S. at 69. The tax in question was applied at the time the goods were delivered to the common carrier for shipment

abroad, and thus the tax was imposed on the export process in violation of the Constitution:

> "To put [the taxable event] at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19." 262 U.S. at 70.

B. The Controlling Force of *Thames & Mersey*

We see, then, that *Thames & Mersey* fits squarely within the Court's consistent interpretation of the Export Clause and has been frequently relied upon and cited with approval, even in cases which the Government suggests are supportive of its position. *Thames & Mersey* involved a non-discriminatory federal tax -- an excise tax on casualty marine insurance, whether for domestic or export shipments. But, as applied to exports, it was held unconstitutional. Insurance "is essential to the process of exporting" (*Thames & Mersey*, 237 U.S. at 26), "one of the necessities of exportation" (*id.* at 27). Applying a federal excise tax to such insurance placed an impermissible burden on the exportation process:

> "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." *Id.* at 27.

The Government thus concedes, as it must, that *Thames & Mersey* is indistinguishable from this case and -- unless overruled -- compels affirmance of the judgment below. The § 4371 tax has been applied to insurance policies that cover IBM's export shipments from the time the products are delivered to a common carrier for shipment abroad, to the time the products arrive at their foreign destination. The tax varies directly with the value of the exports, because the tax is a fixed percentage of the premiums and the premiums in turn vary directly with the cargo's value. In practical effect the tax is an ad valorem tax on the cargo's value and applies directly to and throughout the export process. It is therefore unconstitutional under *Thames & Mersey*, even if it does not discriminate against exports.

II. The Government's Request that the Court Overrule *Thames & Mersey* Should Be Rejected.

The Government's argument for overruling *Thames & Mersey* boils down to this: For many years, the Export Clause and Import/Export Clause were construed in tandem (which is true). Then, in the 1970s, the Court changed its interpretation of the Import/Export Clause to permit non-discriminatory State taxation of imports and exports (also true, to a degree[19]). Thus (in the Government's view), this "modern doctrine" should now be applied to the Export Clause.

What this argument lacks is analysis of *why* the Court changed its interpretation of the Import/Export Clause, and

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[19] As discussed in Part III below (pp. 42-44), the Government's reading of the holdings of the new Import/Export Clause cases is somewhat more expansive than is merited.

whether the reasons for that change apply to the Export Clause. Without such an analysis, the Government's argument is no more logical than this: For many years, it was commonly thought that porpoises and tuna were both fish. Then, scientists discovered that the porpoise was actually a mammal. Therefore, we now know that tuna are mammals as well. Obviously, one should not jump to this second conclusion without first examining the reasons *why* scientists changed their minds about porpoises (warm- rather than cold-blooded, etc.) and then considering whether or not those reasons apply to tuna. For all practical purposes, the Government's argument omits consideration of those critical questions.

The explanation for the omission is evident: The reasons the Court changed its analysis of the Import/Export Clause are *not* applicable to the Export Clause. To the contrary, those reasons confirm rather than refute the Court's long-standing conclusion that the Export Clause precludes federal taxation of the export process, discriminatory or not.[20]

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[20] It is worth noting that the line the Government seeks to draw between discriminatory and non-discriminatory taxes will often be hazy. A facially non-discriminatory tax may be imposed only against products that are predominantly exported (*e.g.*, right-hand-drive automobiles), or a tax in practical effect may weigh more heavily on exports than domestic goods. The § 4371 tax is itself an example, because insurance premiums (and therefore the tax) will typically be higher for long international shipments than for domestic shipments, even when the intra-U.S. transportation legs of the two shipments are of the same length.

Similarly, a tax that on its face is specifically directed at exports may not seem so discriminatory when viewed in the broader context. For example, the tax provision in *Fairbank* applied only to export

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A. The "Modern Decisions" Under the Export and Commerce Clauses

Before turning to the Import/Export Clause cases, we first address briefly two other categories of "modern decisions" (U.S. Br. 24) which the Government claims support a new reading of the Export Clause. The first is itself an Export Clause case -- *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918) (U.S. Br. 24-26). But, as already discussed (pages 22-24 *supra*), *Peck & Co.* is entirely consistent with the Court's historical reading of the Export Clause, and it quotes and cites *Thames & Mersey* with approval. And, in the subsequent *Spalding* decision, the Court flatly rejected the very argument for reinterpretation of the Export Clause that the Government makes here today. *See* page 24 *supra*. Hence, neither *Peck* nor *Spalding* supports the Government's position.

The Government's second category of cases is even more startling -- cases under the Commerce Clause in which the Court held that the negative implications of that Clause did not preclude non-discriminatory State taxation of businesses engaged in interstate commerce. *E.g.*, *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938); U.S. Br. 26. Quite the reverse of the Export Clause, the Commerce Clause is a federal *grant* of power *to* the federal government, and -- for reasons well known to the Court -- that clause has been construed by implication to restrict State powers in only limited circumstances. The negative implications of the Commerce Clause are hardly a valuable guide in construing an

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[20](...continued)
transactions, but it was part of a far broader tax bill that separately taxed comparable domestic transactions, albeit in different ways or at different rates. *See* War Revenue Act of June 13, 1898, ch. 448, 30 Stat. 448.

express and categorical constitutional limitation on federal powers. As the Government elsewhere in its brief concedes, "decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause." U.S. Br. 22 n.8.

B. Newer Decisions under the Import/Export Clause

The Government's principal argument for overruling *Thames & Mersey* rests on recent cases under the Import/-Export Clause, in particular *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). *Michelin* and *Washington Stevedoring* held that the Import/-Export Clause did not prohibit the application of certain non-discriminatory State taxes to import and export commerce, and the Government now argues that the same analysis should govern the Export Clause. But *Michelin* and *Washington Stevedoring* provide no support for a revised reading of the Export Clause. Indeed, the analysis that the Court invoked to narrow the protections of the Import/Export Clause with respect to State taxation is consistent with and actually supports the Court's long-standing rule of broader protection under the Export Clause.[21]

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[21] The Government also cites two other Import/Export Clause cases, but they can be disposed of quickly. *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951) (U.S. Br. 27), upheld a Maryland franchise tax imposed on railroads and measured by the carrier's gross receipts apportioned by the length of its lines within the State. The taxpayer claimed that the tax could not be applied to the extent its lines were used to carry imports and exports in the Baltimore harbor. Because the transportation services

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In *Michelin*, the Court held that Georgia's ad valorem property tax could be applied to imported goods no longer in transit in the same manner that the tax applied to domestic goods. The Court reasoned that the Import/Export Clause was intended by the Framers to serve three purposes: (1) that the federal government speak with one voice in regulating foreign commerce; (2) that federal import revenues not be diverted to the States; and (3) that State imposts and duties not disrupt harmony among the States, particularly between seaboard and inland States. 423 U.S. at 285-86. A non-discriminatory State property tax, applied equally to domestic and imported goods, did not clash with those objectives.

The *Michelin* Court then observed that, consistent with its limited objectives, the Import/Export Clause was phrased in terms of a prohibition only of State "imposts" and "duties," and "just as clearly, the Clause is *not* written in terms of a broad prohibition of every '*tax*'." *Id.* at 290 (emphasis added). Relying on historical sources, the Court found the omission from the Import/Export Clause of the term "tax" to be important and to signify that the clause should apply only

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[21](...continued)
in question were provided wholly within the State and the taxpayer was not itself engaged in the import/export business (*id.* at 514), the Court found no infringement of the Import/Export Clause. *Fairbank*, *Hvoslef* and *Thames & Mersey* were distinguished as more directly involving the exportation process, and the Court also noted that those federal tax cases had been decided under the Export Clause rather than the Import/Export Clause. *Id.* & n.2.

Limbach v. *Hooven & Allison Co.*, 466 U.S. 353 (1984) (U.S. Br. 31-32), was also decided under the Import/Export Clause and applied the new construction of that provision adopted in *Michelin* and *Washington Stevedoring*. Neither the Export Clause nor any of its precedents were discussed.

to revenue measures that were targeted at goods produced abroad. *Id.* at 287, 291-93. That is, generally applicable State taxes are "[u]nlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country . . . ." *Id.* at 287.[22]

This line of reasoning was extended to State taxation of exports in *Washington Stevedoring*. That case involved Washington's business and occupation tax as applied to stevedoring activities conducted within the State. The Court reviewed the limited purposes of the Import/Export Clause that had been identified in *Michelin* and found here too that the State tax did not offend those objectives. As the tax did not discriminate between export and domestic commerce and applied only to services conducted within the State, the tax caused neither disharmony among the States nor disruption of federal foreign affairs. Moreover (and a point the Government's brief in this case wholly ignores), a State tax affecting exports would not interfere with federal tax revenues because the federal government was itself precluded by the Export Clause from taxing exports.[23] The Court then reiterated the "central holding" of *Michelin*: that the Import/Export Clause by its terms was a prohibition "only of 'Imposts or Duties' and not of all taxes." 435 U.S. at 759. A non-discriminatory State

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[22] Thus, the Court construed "imposts and duties" in the Import/-Export Clause as analogous to the treaty language at issue in *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U.S. 60, 113 S. Ct. 1095 (1993), which applied only to revenue measures "collected on, or in connexion [sic] with, the importation of goods" or "chargeable by reason of importation," but not to taxes generally. 113 S. Ct. at 1099.

[23] The Import/Export Clause as applied to exports "does not serve to protect federal revenues . . ., *because the Constitution forbids federal taxation of exports*. U.S. Const., Art. I, § 9, cl. 5; see *United States* v. *Hvoslef*, 237 U.S. 1 (1915)." 435 U.S. at 758 (emphasis added).

levy on services performed within the taxing state was thus held not to be an impost or duty within the meaning of the Import/Export Clause. *Id.* at 761.

C. The Relevance of *Michelin* and *Washington Stevedoring* to the Export Clause

Plainly, *Michelin* and *Washington Stevedoring* cannot be read as supporting the Government's proposed reinterpretation of the Export Clause. Both rulings were based on a textual examination of the Import/Export Clause (dealing with imposts and duties but "not written in terms of a broad prohibition of every 'tax'"; *Michelin*, 423 U.S. at 290) and on the limited purposes which the Framers intended that clause to serve. Both decisions stressed the omission of the word "tax" from the Import/Export Clause prohibition and both contrasted that language with the Article I, § 8, cl. 1 grant to Congress of the "Power To lay and collect *Taxes*, Duties, Imposts and Excises." *Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759 (emphasis added). The language of the Export Clause similarly contrasts with the Import/Export Clause, for the Export Clause provides: "*No Tax* or Duty shall be laid on Articles exported from any State." (Emphasis added). The absence of a prohibition on "taxes" in the Import/Export Clause was central to the *Michelin* and *Washington Stevedoring* holdings, and belies the notion that those decisions are guidance to interpreting the Export Clause, which explicitly *does* prohibit any federal "*tax*." *See also Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) ("The new focus [under the Import/Export Clause is] on whether the tax sought to be imposed is an 'Impost or Duty.'").

But the defect in the Government's position is deeper than linguistic. *Michelin* and *Washington Stevedoring* concluded

that the objectives of the Import/Export Clause were to ensure that the States not intrude on specified federal prerogatives (foreign affairs and import revenues) and that maritime states not exploit their geographic position against inland states. *Michelin*, 423 U.S. at 285-86; *Washington Stevedoring*, 435 U.S. at 752-53. Quite obviously, these were not the objectives of the Export Clause, which imposes restrictions on the *federal* government (not on the States) and does not deal with relations among the State governments. Indeed, the discussion in *Washington Stevedoring* of the Import/Export Clause objectives cannot be reconciled with the Government's position here. There, the Court noted that one purpose of the Import/Export Clause was to ensure that the States did not impair federal taxation of imports, which were expected to be a major source of revenue for the national government. In addressing the relevance of that objective in the export context, the Court observed that giving the States greater taxing leeway would not impair federal revenues because *the federal government itself could not tax exports*. 435 U.S. at 758, citing the Export Clause and *United States* v. *Hvoslef*.[24] It defies logic for the Government to argue that *Washington Stevedoring* supports new, broader taxing authority for the federal government, when the Court's holding that the States could tax exports relied directly on the proposition that the federal government could not.

A sharp distinction between the scope of the Export Clause and Import/Export Clause is also compelled by the historical record. The principal (although not exclusive) purpose behind the Export Clause was to deny Congress the power to burden Southern exports of regional crops that were

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[24] *See* note 23 *supra*.

not grown in other States (tobacco, indigo, etc.).[25] Obviously, even a "non-discriminatory" tax on tobacco shipments (for example) would have precisely that effect.[26] So important was this issue that the Export Clause was among the most actively debated compromises at the 1787 Convention.[27] The question whether the federal government could tax exports was interwoven with other fundamental issues, including the apportionment of direct taxes by population and the status of slavery. Some delegates declared emphatically that the Export Clause exemption was necessary for their support for any federal taxation power,[28] or indeed for the entire Constitution.[29]

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[25] Delegates also supported the Export Clause because it would encourage export industries and limit the federal government's overall taxing power. *See* pp. 10-11 *supra*. *Fairbank* v. *United States* explicitly rejected the argument that the Export Clause should be narrowly construed to apply only in the situation where a tax or duty implicates the issue of inter-regional discrimination. 181 U.S. at 292.

[26] The vast bulk of the South's Colonial-era tobacco production was exported. *See* Peter V. Bergstrom, *Markets and Merchants: Economic Diversification in Colonial Virginia, 1700-1775* 129-52 (1980); 1 Emory R. Johnson, T.W. Van Metre, G.G. Huebner & D.S. Hanchett, *History of Domestic and Foreign Commerce of the United States* 59-60 (1915).

[27] *See, e.g.*, *Fairbank* v. *United States*, 181 U.S. 283, 290 (1901) (the Export Clause "was one of the compromises which entered into and made possible the adoption of the Constitution").

[28] 2 *Records*, *supra* note 6, at 305-06 (statement of George Mason of Virginia).

[29] *Id.* at 95 (statement of General Pinckney of South Carolina), 360 (statement of Hugh Williamson of North Carolina), 360 (statement of (continued...)

The Export Clause was opposed by other delegates, however, who wanted a strong federal government and who argued that export industries -- which would require a navy for their protection -- should be compelled to contribute to federal revenues.[30] The Government's policy argument here that exports should pay their fair share of federal revenues (U.S. Br. 35-36) was thus considered and rejected by the Convention. In the course of that debate, the delegates considered but rejected proposals for less than a total ban on export taxation, including a requirement of a two-thirds vote for such taxes, a proposal that the ban apply only to some products, a suggestion that the ban expire after a period of years, and a proposal that export taxes be prohibited only if imposed "for the purposes of revenue."[31] James Madison, a Virginian but nevertheless a strong federalist, urged a more qualified clause -- some "lesser evil than a total prohibition."[32] But a majority rejected all efforts to weaken the Clause because many delegates feared that Congress would inevitably exercise its taxing power to burden unfairly the exports of one region or another.[33] The delegates thus

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[29](...continued)
Pierce Butler of South Carolina: "strenuously opposed to a power over exports; as unjust and alarming to the staple States").

[30] *E.g.*, 2 *Records* 220 (statement of Rufus King), 306-07 (statement of James Madison).

[31] 2 *id.* at 359-63.

[32] 2 *id.* at 363.

[33] Elbridge Gerry stated that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partial- (continued...)

adopted a bright-line approach that removed exports entirely from the federal government's powers of taxation.

The Import/Export Clause was less controversial and more qualified. That Clause was designed principally to prevent the "commercial states" (those with major ports) from imposing oppressive imposts and duties upon the trade of their neighboring non-commercial states.[34] This conduct by the commercial states was a species of the interstate discrimination that gave rise to the Commerce Clause and, accordingly, the two provisions were seen as interrelated. Indeed, some wondered whether the Import/Export Clause added significantly to the protections that would be available under the Com-

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[33](...continued)
ly, raising one and depressing another part of it." 2 *id.* at 307. As Roger Sherman of Connecticut ultimately concluded, "it is best to prohibit the National legislature in all cases." *Id.* at 361.

Advocates and opponents alike characterized the Clause as adopted as having very broad effect. *E.g.*, *id.* at 220 (Rufus King: "the hands of the legislature were absolutely tied. . . . exports could not be taxed"), 361 (John Dickinson of Delaware: the proposed clause "must be of dangerous consequence" for it would prohibit export taxation "with respect to all articles and for ever"); George Mason, "An Old Planter," *Virginia Independent Chronicle*, Feb. 20, 1788, *reprinted in* 8 *The Documentary History of the Ratification of the Constitution* 397 (1988) ("Our tobacco, our corn, our grain, and all the productions of the earth, are forever exempted from all taxes or all duties on exportation . . . .").

[34] *See, e.g.*, 2 *Records* 306 (statement of James Madison); 3 *id.* 542. One indication of the differing purposes and background of the Export Clause and Import/Export Clause is that Madison was an opponent of the former but a supporter of the latter. *Id.*

merce Clause.[35] There also was ready agreement that the Import/Export Clause should not be phrased in sweeping terms. For example, States were permitted to impose duties or imposts provided that Congress consented and the net revenues were provided to the federal treasury. Also, the States were allowed to impose duties and imposts to cover their costs of port inspection. Although the southern States had insisted on an unqualified Export Clause, it was the South that urged a narrowing of the Import/Export Clause to allow inspection duties.[36]

Additionally, the Import/Export Clause prohibited only "Imposts or Duties," as compared to the Export Clause's prohibition of "Tax or Duty." The reason for the different treatment of "imposts" is obvious; that term was commonly used as meaning a customs fee on imports,[37] and the Import/Export Clause but not the Export Clause implicated imports. "Duty" had a less precise meaning; sometimes it was used broadly so as to be virtually synonymous with "tax," whereas it was also often used in the narrower sense of a customs levy. For example, in testimony to the British House of Commons explaining American opposition to the Stamp Act of 1765, Benjamin Franklin observed that the term "duty" had a narrower meaning in America than in Britain: "the same

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[35] 2 *id.* 441 (statement of Gouverneur Morris).

[36] 2 *id.* 588-89.

[37] Based on historical evidence, the Court in *Michelin* concluded that, as used in the Constitution, "'[i]mposts' were like customs duties, that is, charges levied on imports at the time and place of importation." 423 U.S. at 291. *See, e.g.*, 3 *Records* 203 ("the word *imposts* extended to duties on goods *imported*") (emphasis in original), *quoted at* 423 U.S. at 291 n.12. *See also Brown* v. *Maryland*, 25 U.S. at 437.

words have not always the same meaning here and in the Colonies. By taxes they [the Americans] mean internal taxes; by duties they mean customs . . . ."[38] Similarly, in discussing the Import/Export Clause during the 1787 Convention, Gouverneur Morris used "duty" in the same narrower sense:

> "Mr. Govr Morris . . . did not consider the dollar per Hhd laid on Tobo in Virga. as a duty on exportation, as no drawback would be allowed on Tobo. taken out of the Warehouse for internal consumption."[39]

Thus, a state tax that was applied equally to exports and domestic products ("no drawback [rebate] would be allowed . . .") was not a "duty" as that term was used in the Import/-Export Clause. This, of course, is consistent with the Court's reading of that clause in *Washington Stevedoring*.[40]

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[38] 13 *The Papers of Benjamin Franklin* 156 (Leonard W. Labaree ed. 1969), *quoted in* 1 *The Compact Edition of the Oxford English Dictionary* 730 (1971). Johnson's Dictionary indicates that "duty" was used in England in both the broad and narrow sense: "[t]ax; impost; custom; toll." 1 Samuel Johnson, *Dictionary of the English Language* (1755). Franklin highlighted the distinction between "tax" and "duty" because he acknowledged that Parliament had the power impose to external taxes on the Colonies ("duties"), but he argued that it had no right to impose more generally applicable "internal" taxes. *See* Thomas P. Slaughter, *The Whiskey Rebellion* 17-18 (1986).

[39] 2 *Records* 589.

[40] For other discussions of the distinction between the term "duty" and "tax," *see Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 622 (1895); *Pacific Ins. Co.* v. *Soule*, 74 U.S. 433, 445 (1868). Justice Thompson, in dissenting in *Brown* v. *Maryland*, drew a distinction (continued...)

Significance must be given, then, to the fact that the Framers used both "tax" and "duty" in the Export Clause (as they did when giving general taxing power to Congress in Art. I, § 8, cl. 1), but only "duty" in the Import/Export Clause.[41] To use Benjamin Franklin's phrase, the Framers intended that even "internal taxes" could not be applied by the federal government to the export process. This broader reading of the Export Clause is compelled by the text and structure of the relevant constitutional provisions, and the historical record read as a whole. As James Madison aptly wrote in summarizing the Convention's extensive debate over the scope of the Export Clause: "The result is seen in the Constitution."[42] Indeed it is: "No Tax or Duty shall be laid on Articles exported from any State."

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[40](...continued)
between "tax" and "duty," arguing that the State licensing fee in that case was a "tax" and therefore outside the scope of the Import/Export Clause. 25 U.S. at 455-56. Clearly, "tax" was almost always used in the broader sense and "duty" often -- but not always -- in the narrower, customs sense.

[41] *See also* the notes of the Committee of Detail, which in adjoining paragraphs state "No Taxes on exports" by the federal government but "no Duty on exports" by the States. 2 *Records* 142-43.

[42] Letter of James Madison to Thomas Jefferson (Oct. 24, 1787), 3 *Records* at 135:

> "Some contended for an unlimited power over trade including exports as well as imports, and over slaves as well as other imports; some for such a power, provided the concurrence of two thirds of both Houses were required; Some for such a qualification of the power, with an exemption of exports and slaves, others for an exemption of exports only. The result is seen in the Constitution."

D. The Compelling Text of the Constitution

The most fundamental defect in the Government's argument is that it can offer no plausible basis for its interpretation of this constitutional language: "No Tax or Duty shall be laid on Articles exported from any State." It admits that a "Tax" is involved. Also, unquestionably there are "Articles" being "exported" from the States. Nor does the Government challenge Chief Justice John Marshall's statement in *Brown* v. *Maryland* or the Court's holding in *Fairbank* and other cases that imposition of a tax on the export process is the same as imposition of a tax on "Articles exported." Accordingly, the only textual argument left to the Government is that "laid on" means something like "specifically directed at" or "discriminate against." *See* U.S. Br. 34 & 36.

This position is not supportable. "Laid on" is simply a now somewhat archaic way of saying "imposed on" or "applied to." Gouverneur Morris, in the statement quoted on page 38 above, thus referred to a tax "laid on Tobo in Virga." in precisely that sense. Likewise, during the Stamp Act crisis, a Virginia delegation protested to the British Crown in these terms:

> "Your Memorialists conceive it to be a fundamental Principle . . . without which Freedom can no Where exist, that the People are not subject to any Taxes but such as are laid on them by their own Consent . . . ."[43]

[43] Virginia Petitions to King and Parliament (Dec. 18, 1764), quoted in *Missouri* v. *Jenkins*, 495 U.S. 33, 68 (1990) (opinion of Kennedy, J.).

They were referring to a tax on stamps that imposed burdens on the citizenry, irrespective of any element of discrimination. More recently, in considering whether a non-discriminatory tax could be applied constitutionally to particular persons or property, the Court framed the question as whether the tax could be "laid on" such persons or property. *E.g.*, *New York* v. *United States*, 326 U.S. 572, 586 (1946) ("we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike") (Stone, C.J.); *Mayo* v. *United States*, 319 U.S. 441, 447 (1943) (a non-discriminatory Florida inspection fee violated the Supremacy Clause to the extent the fee was "laid" on activities of a U.S. government agency). Article I, § 8, cl. 1 gave Congress the power "To lay and collect Taxes," with the verb "to lay" meaning simply "to impose" or "to enact."[44]

Finally, the Import/Export Clause also uses the verb "to lay," and yet the Court's analysis in *Michelin* and *Washington Stevedoring* gave no special significance to that phrase. Instead, the Court focused on what forms of revenue measures were laid by the States -- were they "taxes" or were they "imposts or duties"?[45] The Government's argument here necessarily implies that the Court was looking at the wrong issue and that the distinction it drew between "tax," "duty," and "impost" was of no significance. So, here again, the very

[44] *See also* The Federalist No. 36, at 220 (Alexander Hamilton) ("The method of laying and collecting . . . taxes in each State can, in all its parts, be adopted and employed by the federal government.").

[45] *See also Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) ("The new focus [under the Import/Export Clause is] on whether the tax sought to be imposed is an 'Impost or Duty.'").

cases upon which the Government relies are contrary to its proposed analysis.

* * * *

As the Court said in *Fairbank* v. *United States*, 181 U.S. 283, 290 (1901): "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" This constitutional command cannot be swept aside by arguing that a tax that burdens exports is not "laid on" exports. The Framers intended that exports "not be made a source of revenue to the National Government" and, indeed, that the federal government "should put nothing in the way of burden upon such exports." *Id.* at 292-93. *Thames & Mersey* thus correctly construed and applied the Export Clause, and should be reaffirmed.

III. Even if the Import/Export Clause Analysis Were Relevant to This Case, the § 4371 Tax Is Still Unconstitutional as Applied.

For the reasons just discussed, the Export Clause analysis should be unaffected by recent decisions under the Import/-Export Clause. But even if that were not so, the result in this case is unchanged. As the Court of Federal Claims ruled in its alternative holding, *Thames & Mersey* and the present case are readily distinguishable on their facts from *Michelin* and *Washington Stevedoring*. *Michelin* involved a state tax on imported goods that were no longer in transit (423 U.S. at 302), and the stevedoring levy in *Washington Stevedoring* involved a tax "upon a service distinct from the goods *and their value*." 435 U.S. at 757 (emphasis added). On this point, the Court in *Washington Stevedoring* footnoted *Thames & Mersey* and observed: "In distinguishing that case from the

taxation of stevedoring activities . . ., one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* at 756 n.21.

The § 4371 tax in question here, like the tax in *Thames & Mersey*, applies to the goods while in transit and bears a direct relation to the value of the goods. The tax is a percentage of the premium paid, and the premium in turn varies with the declared value of the shipment. (Pet. App. 39a) Thus, as the lower court held:

> "In the present case, the casualty insurance policies were at all times within the export stream and were significantly related to the exportation process. Whether the § 4371 tax would be impermissible even without the support of *Thames & Mersey* is, we realize, not stated dispositively by the Court [in *Washington Stevedoring*], but there is nothing in *Washington Stevedoring* that indicates that *Thames & Mersey* and the connection drawn in that case between insurance policies and the value of goods have been banished into irrelevance." (Pet. App. 29a)

On this alternative ground, then, the § 4371 tax as applied to IBM's exports is still invalid under the Export Clause, even assuming that *Michelin* and *Washington Stevedoring* are relevant precedents for the Export Clause. For example, in *Itel Containers International Corp.* v. *Huddleston*, 113 S. Ct. 1095 (1993), the Court rejected an Import/Export Clause attack on Tennessee's sales tax applied at the time the empty containers were delivered to shippers within the State. Some of those containers, in turn, were then used in import and export commerce. The Court found no constitutional infringement because the tax was "on a business transaction occurring within the taxing State" and "does not draw revenue from the

importation process . . ." 113 S. Ct. at 1106.[46] Here, by contrast, the § 4371 tax varied with the value of IBM's goods and -- by its very nature -- was applied to the exportation process.

Accordingly, the § 4371 tax is unconstitutional even under the mode of analysis applied under the Import/Export Clause. *See Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990) (non-discriminatory state tax as applied to jet fuel sold for export violated Import/Export Clause); *Virginia Indonesia Co.* v. *Harris County Appraisal Dist.*, 910 S.W.2d 905 (Tex. 1995) (non-discriminatory local ad valorem property tax as applied to exports in transit violated Import/Export Clause).

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[46] *See also* 113 S. Ct. at 1108 (Scalia, J., concurring) ("To come within this constitutional exemption [the Import/Export Clause], . . . the taxed good must be either an import or an export 'at the time that the tax accrued.'") (quoting *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 78 (1946)).

CONCLUSION

The judgment below should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Justice Story's *Commentaries on the Constitution* (1833) (R. Rotunda and J. Nowak reprint, 1987, Carolina Academic Press) 11
Webster's Third New International Dictionary (Unabridged) (1986) 11

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It is appropriate to emphasize at the outset the precise nature of respondent's claim in this case. Respondent does not dispute that the tax imposed by Section 4371 of the Internal Revenue Code may constitutionally apply to insurance obtained in connection with domestic shipments of goods. Instead, respondent claims only that this tax may not apply to insurance procured in connection with shipments of goods to foreign countries. If, for example, respondent ships cargo on a voyage from California to Alaska, with an intermediate stop in British Columbia, respondent asserts only that the insurance for the shipment offloaded in British Columbia—not the insurance for the shipment continuing on to Alaska

—is constitutionally exempt from the generally applicable federal tax.

Respondent's submission is thus grounded in the proposition that the Export Clause requires preferential, rather than nondiscriminatory, treatment of exports and the export process. No decision of this Court prior to *Hvoslef* and *Thames & Mersey* supports respondent's submission, and decisions both prior and subsequent to those cases contradict it.

1. a. Respondent errs in contending (Resp. Br. 9-26) that *United States* v. *Hvoslef*, 237 U.S. 1 (1915), and *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), are part of an unbroken line of authority supporting the view that generally applicable, nondiscriminatory taxes are invalid as applied to goods for export and export transactions. Decisions of this Court both before and after *Hvoslef* and *Thames & Mersey* hold that "a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition." *Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886). See also *Peck & Co.* v. *Lowe*, 247 U.S. 165, 175 (1918); *Cornell* v. *Coyne*, 192 U.S. 418, 427-428 (1904).[1]

[1] The first two decisions of this Court under the Export Clause involved a federal tax on manufactured tobacco products. Tobacco intended for export was exempt from this tax, subject to the requirement that packages for export be identified by an engraved stamp costing 25 cents. *Pace* v. *Burgess*, 92 U.S. 372 (1876); *Turpin* v. *Burgess*, 117 U.S. 504 (1886). In each case, the plaintiffs sought a refund of amounts paid for the identifying stamps. In *Pace*, the Court concluded that the stamp requirement did not violate the Export Clause because it was not itself a tax but merely a device to prevent fraud and to deter untaxed tobacco products from entering the domestic economy. When Congress thereafter removed the charge for the identifying stamp in a statute that referred to it as an "export tax," Turpin brought suit to recover amounts he had paid. The Court rejected that claim, relying again on the analysis set forth in *Pace*. The Court in *Turpin* went on to say that, even if the charge for the stamp was a tax, it was "a general tax, laid on all property alike," rather than a specific tax on or related to exports. The Court concluded (117 U.S. at 507):

> Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained.

This conclusion is, of course, inconsistent with respondent's contention that an unbroken line of authority supports the holding in *Hvoslef* and *Thames & Mersey* that a nondiscriminatory tax may not be applied to goods for export.

Respondent claims that this passage from *Turpin* v. *Burgess* supports the proposition that even a nondiscriminatory tax "laid on all property alike" (117 U.S. at 507) is constitutionally barred from applying to "goods in course of exportation" (*ibid.*)—goods that have commenced what respondent refers to as the "export process" (Resp. Br. 20). It is axiomatic, however, that a tax that is "laid on all property alike" reaches, by definition, goods in the "export process." Goods in the export process are a subset of "all property." In the quoted passage from *Turpin* v. *Burgess*, the Court was distinguishing between taxes of general application, which the Export Clause does not proscribe, and taxes that are laid specifically, or discriminatorily, "on goods in course of exportation" or "because of their intended exportation" (117 U.S. at 507), which are unconstitutional. The Court made this clear by emphasizing in *Turpin* that, if the "same" tax applicable to domestic products had also

been applied to goods for export, the taxpayer "could not have complained" (*ibid.*). See also *Peck & Co.* v. *Lowe*, 247 U.S. at 175 (upholding a federal tax that applied without "discrimination" and that affected "exportation * * * only indirectly and remotely"); note 1, *supra*.

The Court reached this same conclusion in *Cornell* v. *Coyne*, 192 U.S. 418 (1904), in upholding application of a general excise tax on "filled cheese" even as applied to such cheese produced specifically for export. *Id.* at 427. The Court explained that "[t]he constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State" and that "in both cases" it refers to duties imposed "by reason or because of" the exportation; it does not refer to "a general tax, laid on all property alike" (*ibid.*, quoting *Turpin* v. *Burgess*, 117 U.S. at 506). In so holding, the Court explained that the Export Clause does not relieve exports "from the prior ordinary burdens of taxation which rest upon all property similarly situated" (192 U.S. at 427).[2]

Respondent's suggestion that goods in the "export process" are to be relieved "from the prior ordinary burdens of taxation which rest upon all property similarly situated" is, in substance, a claim that a converse of the "original package" doctrine should

[2] The only other case decided under the Export Clause prior to *Hvoslef* and *Thames & Mersey* was *Fairbank* v. *United States*, 181 U.S. 283 (1901). In *Fairbank*, the Court held unconstitutional a stamp tax on bills of lading "for any goods, merchandise, or effects, to be exported from a port or place in the United States" (ch. 448, § 25 (Schedule A), 30 Stat. 459). By its terms, this tax was specifically on, and limited to, export transactions.

apply under the Export Clause. Under respondent's theory, when an article of commerce crosses an imaginary line representing the beginning of what respondent would view as the "export process," an *absolute* immunity from general taxes for that good *and* for any handling of that good (*and* for any insurance upon the handling of that good) arises under the Export Clause. But this Court rejected precisely that type of formalistic reasoning in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 298 (1976), in concluding that a tax imposed on imported articles in their "original package" is constitutionally permissible if the tax does not treat "imported goods * * * differently from the 'common mass of property in the country' * * *." See also *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) (upholding application of a nondiscriminatory state tax to revenues from stevedoring services rendered in the "process" of importing and exporting goods). A nondiscriminatory federal tax that does not treat "[exported] goods * * * differently from the 'common mass of property in the country'" is similarly constitutional. See Pet. Br. 32-37.

b. The 1915 decisions in *Hvoslef* and *Thames & Mersey* involved stamp taxes imposed by the War Revenue Act of 1898. *Hvoslef* involved a stamp tax on any "contract or agreement for the charter of any ship" without reference to the destination or area of operation of the ship. *Thames & Mersey* involved a stamp tax on policies of marine insurance "whether covering peril by sea or on inland waters." The challenged taxes thus applied without discrimination to both domestic and foreign commerce. Falling on all property alike, the taxes were of the type that this

Court had concluded should be sustained in *Cornell* and *Turpin*.

In *Hvoslef* and *Thames & Mersey*, however, the Court relied on the rationale of *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887), for the proposition that even nondiscriminatory taxes may not constitutionally be applied to exports or to export transactions.[3] See 237 U.S. at 18. In *Robbins*, the Court had held that the Commerce Clause precludes application of general, nondiscriminatory state taxes to interstate commerce. In *Hvoslef*, the Court stated that it knew "of no ground upon which" the treatment afforded to nondiscriminatory state taxes under the Commerce Clause should differ from the treatment to be afforded to nondiscriminatory federal taxes under the Export Clause. 237 U.S. at 18.

The reasoning that the Court applied in *Robbins*, of course, was subsequently "*repudiated*" by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). See *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984); Pet. Br. 29-30. Aside from the rationale of *Robbins*, which has now been repudiated, there was and is no authority for the conclusion reached by the Court in *Hvoslef* and *Thames & Mersey*.

c. Respondent suggests (Resp. Br. 23) that the tenuous line of authority in which it asserts *Hvoslef*

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[3] In *Hvoslef*, the Court also relied on *Fairbank* v. *United States*, *supra*, for the proposition that a tax on bills of lading is equivalent to a tax on the article exported. 237 U.S. at 14-15. But *Fairbank* involved a discriminatory tax that applied *only* to exported goods (see note 2, *supra*) and *Hvoslef* did not. In *Hvoslef*, the Court therefore relied exclusively on *Robbins* as support for its holding that a nondiscriminatory tax may not constitutionally be applied to goods for export. 237 U.S. at 18.

and *Thames & Mersey* are located extends to *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918). In that case, the Court, after reviewing each of the earlier cases involving the Export Clause, upheld the application of the federal income tax to income from export sales. The Court noted that the income tax is on net income, rather than on gross export sales. The more fundamental rationale for that decision, however, is found in the Court's observation that the income tax is a general tax, "not laid on income from exportation because of its source, or in a discriminatory way, but just as it is laid on other income." See Pet. Br. 25-26 & n. 9. The Court emphasized in *Peck & Co.* that the tax involved "no discrimination" and that, "[a]t most, exportation is affected only indirectly and remotely." 247 U.S. at 175. That same rationale sustains the nondiscriminatory tax challenged in this case.

d. Finally, the unbroken line of authority proclaimed by respondent assuredly does not include this Court's most recent decisions dealing with the subject. In *Michelin Tire Corp.* v. *Wages*, the Court noted that its decisions had made "crystal clear" that the Import-Export Clause does not bar application of nondiscriminatory state taxes to imports—whether in the "original package" or not. 423 U.S. at 300. And, in *Washington Stevedoring*, the Court applied that same reasoning in upholding the application of nondiscriminatory state taxes to the handling of goods for export (an aspect of what respondent terms the "export process" (Resp. Br. 20)). 435 U.S. at 757-758.

This Court has often emphasized that "[t]he constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State." *Cornell* v.

Coyne, 192 U.S. at 427. Although there is "some diversity in language" between the Export and Import-Export Clauses, "none is perceivable in the act which is prohibited." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827). As we explain in detail in our opening brief (Pet. Br. 32-37), the same reasons that led this Court to uphold the application of nondiscriminatory state taxes to the "export process" under the Import-Export Clause require that similarly nondiscriminatory federal taxes be upheld under the Export Clause. Indeed, it would be decidedly contrary to the overall scheme of the Constitution to hold that in this one area the States have *greater* discretion than the federal government to enact laws affecting foreign commerce. See Pet. Br. 36.

2. Respondent seeks to minimize the significance of *Michelin Tire Corp.* and *Washington Stevedoring* by magnifying the difference in phrasing of the Export Clause and the Import-Export Clause. The former specifies that "No Tax or Duty shall be laid on Articles Exported" (U.S. Const. Art. I, § 9, Cl. 5); the latter provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports" (U.S. Const. Art. I, § 10, Cl. 2). Respondent contends that the analysis applied by this Court in *Michelin Tire Corp.* and *Washington Stevedoring* is inapplicable to cases involving the Export Clause because the "absence of a prohibition on 'taxes' in the Import/Export Clause was central to the" Court's decisions in those cases (Resp. Br. 32). There are two answers to respondent's contention: (i) it misdescribes the Court's opinions and (ii) it is based on a misunderstanding of the words employed in these constitutional Clauses.

a. In *Michelin Tire Corp.*, the Court held that a "nondiscriminatory" tax on imported goods located within a State is not unconstitutional and that the Court had erred 100 years earlier when it ruled to the contrary in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872). The Court made that point at the outset of its opinion (423 U.S. at 279), explained that nondiscriminatory taxes of general application do not offend the objectives of the Import-Export Clause (*id.* at 283-290), noted that a nondiscriminatory general tax does not clearly represent an "impost" or "duty" laid on imports or exports (*id.* at 291-292), and "decline[d] to presume [the Clause] was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" (*id.* at 293-294). The Court explained that, as long ago as its 1847 opinion in the *License Cases*, 46 U.S. (5 How.) 504, the Court had made "crystal clear" that nondiscriminatory taxes do not offend the Constitution, which proscribes only "exactions upon imports *as imports*" (423 U.S. at 300). The Court's decision in *Low* v. *Austin*, which had held to the contrary, was therefore overruled (*id.* at 279).

The "central" point of *Michelin* is thus twofold. First, that the Import-Export Clause is designed to proscribe only "exactions upon imports *as imports*" (and upon "exports *as exports*"); and second, that the text of that Clause should not be read to proscribe exactions that do not offend that purpose.

That same analysis applies to the Export Clause. The text of the Export Clause proscribes only taxes "laid on Articles exported." As we explain in detail in our opening brief (Pet. Br. 32-37), the limited purposes of the Export Clause, as well as its narrow text, reflect that it is designed to proscribe only exactions

upon exports *as exports*. A nondiscriminatory tax that falls on "all goods alike" is not an exaction upon exports *as exports* and should therefore be sustained. See, *e.g.*, *Cornell* v. *Coyne*, 192 U.S. at 428; *Turpin* v. *Burgess*, 117 U.S. at 507. See also *Michelin Tire Corp.* v. *Wages*, 423 U.S. at 300.

Particularly at a time when export trade increasingly represents a growing portion of our Nation's commerce, it is inappropriate to disregard the limited purpose and narrow text of the Export Clause to provide an absolute immunity for the "export process," as respondent urges. By providing an immunity from taxation upon exports *as exports*, the Constitution does not preclude generally applicable taxes that fall on all goods alike. As this Court has emphasized, the Constitution does not shield articles of export from the same "ordinary burdens of taxation" that also apply to domestic commerce. *Cornell* v. *Coyne*, 192 U.S. at 427.

b. Respondent's contention that the Export Clause prohibits application of nondiscriminatory taxes to the "export process"—even though the Import-Export Clause concededly does not—is grounded on respondent's assertion that the phrase "impost or duty" in the Import-Export Clause is conceptually distinct from the phrase "tax or duty" in the Export Clause. That contention is not correct.

The English language is rich with synonyms. One result of the Norman Conquest, and of the waves of earlier and later commercial and political interaction with the Continent, is that there are innumerable examples in English usage of words that have different origins but indistinct or overlapping meanings. This is particularly so with respect to governmental functions: a lawyer and an attorney, a sheriff and a

marshal, an earl and a duke, are examples. A more relevant example is a "tax" and an "impost." The word "impost" comes from Middle French and is derived from the Medieval Latin "impositum." These terms signify an "imposition." See *Webster's Third New International Dictionary (Unabridged)* 1136 (1986). In usage, an "impost" is a governmental form of imposition: it is "something imposed or levied: TAX, TRIBUTE, DUTY." *Ibid.*

As its derivation and usage reflects, there is no fixed distinction between an "impost" and a "tax." These are words of separate origin that describe an undifferentiated and overlapping concept. For example, *Black's Law Dictionary* 756 (6th ed. 1990) defines the word "imposts" as "Taxes, duties, or impositions levied for divers reasons. * * * Generic term for taxes." Authority more nearly contemporaneous with the adoption of the Constitution also states (Justice Story's *Commentaries on the Constitution* § 472, at 337 (1833) (R. Rotunda and J. Nowak reprint, Carolina Academic Press 1987)):

> In a general sense, all contributions imposed by the government upon individuals for service of the state, are called taxes, by whatever name they may be known, whether by the name of tribute, tythe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.

Justice Story observed that the word "imposts" is (*id.* § 474, at 339):

> sometimes used in the large sense of taxes, or duties, or impositions, and sometimes in the more restrained sense of a duty on imported goods and merchandise.

Brown v. *Maryland*, which was the Court's first decision under the Import-Export Clause, was a contest over this issue of usage or meaning. Chief Justice Marshall announced near the outset of the opinion that "[t]he counsel for the state of Maryland would confine this prohibition [of imposts and duties on imports and exports] to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope." 25 U.S. (12 Wheat.) at 437. The Court then considered, in a number of contexts, the results of each view, and consistently found support for the broader view. The Court concluded that the term "impost" is not used in a narrow or fixed manner, but generally signifies a "tax levied on articles brought into a country" (*ibid.*). That explanation of the term, of course, parallels the text of the Export Clause, which prohibits any "Tax or Duty * * * laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5). It was in that context that Chief Justice Marshall explained that the terms of the Import-Export Clause and the Export Clause are not distinguishable in meaning: "There is some diversity in language, but none is perceivable in the act which is prohibited." 25 U.S. (12 Wheat.) at 445. In *Turpin* v. *Burgess*, 117 U.S. at 506, the Court similarly concluded that "the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State."

As this Court has firmly concluded, there is no textual basis to differentiate "the constitutional prohibition against taxing exports" set out in these two Clauses. And, as we have previously shown (Pet. Br. 32-37), the limited purposes of the Export and Import-Export Clauses compel this same conclusion. For the

same reasons that a generally applicable, nondiscriminatory state tax may constitutionally be applied to goods for export and to the "export process," the generally applicable, nondiscriminatory federal tax involved in this case should also be upheld.[4]

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[4] In addition to *Michelin*, *Washington Stevedoring*, and *Complete Auto*, the Court has issued numerous decisions that overruled older precedent that, in a variety of constitutional contexts, had upheld claims for immunity from generally applicable, nondiscriminatory taxes. As Chief Justice Hughes noted in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 385 (1938), quoting *Willcuts* v. *Bunn*, 282 U.S. 216, 225 (1931):

> In numerous decisions we have had occasion to declare * * * that the power to tax should not be crippled "by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws * * *."

(a) In *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932), the Court upheld a state business tax on gross receipts as applied to royalties from copyrights. The Court "definitely overruled" *Long* v. *Rockwood*, 277 U.S. 142 (1928), which had held that a state income tax could not constitutionally be applied to royalties paid for the use of patents issued by the United States. 286 U.S. at 131.

(b) In *Helvering* v. *Mountain Producers Corp.*, 303 U.S. at 385, the Court upheld application of the federal income tax to income received by a private taxpayer from an oil lease of state-owned land. In so holding, the Court overruled *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), which had held that Oklahoma could not constitutionally apply its income tax to the income of a lessee of restricted Indian lands, and overruled *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), which had held that the federal income tax could not be applied to the income derived by a lessee of lands owned by a State. See 303 U.S. at 387.

(c) In *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939), the Court overruled *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401 (1937), which had held that a state income tax

3. Accepting for purposes of argument that the constitutional reasoning of *Michelin Tire Corp.* and *Washington Stevedoring* is fully applicable under the Export Clause, respondent asserts that the nondiscriminatory tax imposed by Section 4371 is nonetheless unconstitutional as applied to insurance for foreign shipments of export goods. Respondent claims that factual differences make *Michelin Tire*

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could not be applied to the salary of an employee of a federal instrumentality, and also overruled *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), which had held the salary of state judges to be immune from the federal income tax. 306 U.S. at 486.

(d) In *Alabama* v. *King & Boozer*, 314 U.S. 1, 9 (1941), the Court held that the Constitution did not preclude application of state sales taxes to purchases of building materials by a contractor performing a cost-plus contract for the United States. In so holding, the Court overruled *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), and *Graves* v. *Texas Co.*, 298 U.S. 393 (1936).

(e) In *United States* v. *City of Detroit*, 355 U.S. 466 (1958), *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958), and *City of Detroit* v. *Murray Corp*, 355 U.S. 489 (1958), the Court upheld the application of Michigan property and use taxes against industrial taxpayers who leased and occupied real property owned by the United States in the performance of supply contracts with the United States. In each case, the United States unsuccessfully invoked *United States* v. *County of Allegheny*, 322 U.S. 174 (1944), which had held that a government contractor could not constitutionally be liable for a state property tax on machinery owned by the United States.

(f) In *South Carolina* v. *Baker*, 485 U.S. 505, 524 (1988), the Court held that interest on bonds issued by States and their political subdivisions is exempt from the federal income tax only by virtue of the statutory provisions of the Internal Revenue Code and not because of any constitutional requirement. In so holding, the Court overruled *Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429 (1895).

Corp. and *Washington Stevedoring* "distinguishable" from the present case (Resp. Br. 42).

a. Respondent claims that *Washington Stevedoring* is inapposite because the cost of stevedoring services, unlike the cost of insurance, has no economic relation to the value of the exported goods (Resp. Br. 43). That alleged distinction, however, totally ignores the facts and holding of *Michelin Tire Corp.*. The nondiscriminatory *ad valorem* property tax that the Court upheld in *Michelin* was, of course, directly related to the value of the imported goods. It is the very nature of an *ad valorem* tax for the amount of the tax to be related to the value of the property. The relationship between the value of the goods and the challenged tax in *Michelin* was thus unquestionably more direct than in the present case, for the cost of the casualty insurance taxed under Section 4371 of the Internal Revenue Code varies not only with the value of the goods but also with the nature, duration and destination of the shipment.

b. Respondent claims that *Michelin Tire Corp.* is inapposite because the imported goods taxed in that case "were no longer in transit" (Resp. Br. 42). In making that contention, respondent ignores what is perhaps the most essential feature of the Court's decision in that case. As the Court emphasized in *Michelin*, the fact that goods remain in transit and have not yet been "so mingle[d] * * * with the common property within the State as to 'lose their distinctive character as imports' * * * did not mean that * * * no exaction could be imposed on the goods." 423 U.S. at 298, paraphrasing *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) at 441-442. The Court held that a State does not violate the Constitution by taxing property, whether imported or domestic, "in a

manner that [does] not depend on the foreign origins of the goods." 423 U.S. at 298. Respondent's claim of a factual distinction based upon the fact that the goods in this case are "in transit" also ignores that the imported and exported goods for which stevedoring services were provided—and taxed—in *Washington Stevedoring* were unquestionably "in transit." The essential task of stevedoring, of course, is to assist the "transit" of goods.

c. The purported factual distinctions on which respondent relies in its effort to distinguish this case from *Michelin* and *Washington Stevedoring* thus simply do not exist. Because the reasoning of *Michelin* and *Washington Stevedoring* is equally applicable to the Export Clause, and because the nondiscriminatory tax imposed by Section 4371 is not imposed directly or specifically on exports *as exports*, the federal tax challenged in this case should be sustained.

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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